Petition

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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

AMERICAN BRIDGE DIVISION,
UNITED STATES STEEL CORPORATION,
Petitioner

v.

JOHN K. ALFORD, ANTHONY R. BULLER,
HECTOR CANTU AND DIRECTOR, OFFICE OF
WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether this Court will abandon the "situs" test and determine the compensability of an injury under the Longshoremen's and Harbor Workers' Compensation Act solely upon a "status" test, notwithstanding the clear congressional mandate to the contrary embodied in 33 U.S.C. §§ 902(4) and 903(a)?

2. Whether the claimants, John Alford, Anthony Buller, and Hector Cantu, fit the statutory definition of "employee" in 33 U.S.C. § 902(3); that is, whether each was a "person engaged in maritime employment, including any harbor worker including a ship repairman . . . (or a) shipbuilder"?

3. Whether, in each case, the injury occurred upon the navigable waters of the United States "(including any . . . adjoining area customarily used by an employer in repairing, or building a vessel)"?

PARTIES BELOW

In the Court below, the Petitioner was Respondent and Respondents were Petitioners. For the sake of clarity, all parties will be referred to by their proper names.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	I
PARTIES BELOW	II
TABLE OF CONTENTS	III
TABLE OF AUTHORITIES	IV
OPINIONS BELOW	2
JURISDICTION	3
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED AND AT ISSUE	3
STATEMENT OF THE CASE	4
STATEMENT OF FACTS	6
REASONS FOR GRANTING THE WRIT	11
I. The decision and opinion of the Court of Appeals for the Fifth Circuit is in direct conflict with: (a) the congressional intent; (b) the express language of the Act; (c) the recognized rules or principles of statutory construction; and, (d) the Constitution of the United States.	11
II. The Court of Appeals for the Fifth Circuit has decided an important federal question which has not been, but should be, settled by this court.	18
CONCLUSION	19
APPENDIX A-1 — Original Court Of Appeals Opinion	A-1
APPENDIX A-2 — Original Judgment Of Court Of Appeals	A-21
APPENDIX A-3 — Court Of Appeals Opinion As Modified On September 4, 1981	A-23
APPENDIX A-4 — Judgment Of Court Of Appeals On Rehearing	A-28
APPENDIX A-5 — Court Of Appeals Opinion As Changed On September 22, 1981	A-30
APPENDIX B-1 — Benefits Review Board Decision — Alford	B-1

Page

APPENDIX B-2 — Benefits Review Board Decision — Buller B-9

APPENDIX B-3 — Benefits Review Board Decision — Cantu B-13

APPENDIX C-1 — Administrative Law Judge Decision — Alford C-1

APPENDIX C-2 — Administrative Law Judge Decision — Buller C-21

APPENDIX C-3 — Administrative Law Judge Decision — Cantu C-34

TABLE OF AUTHORITIES CITED

CASES

Page

Alford v. American Bridge Division, United States Steel Corporation, 642 F.2d 807 (5th Cir. 1981) 2, 9, 13, 15, 18

Hite v. Maritime Overseas Corporation, 375 F.Supp. 233 (E.D. Tex. 1974) 14

Jacksonville Shipyards, Inc. v. Perdue, 539 F.2d 533 (5th Cir. 1976) 18

Northeast Marine Terminal Company, Inc. v. Caputo, 432 U.S. 249, 97 S.Ct. 2348 (1977) 13

P. C. Pfeiffer Co. Inc. v. Ford, 444 U.S. 69, 100 S.Ct. 328 (1979) 13

Texport's Stevedore Co. v. Winchester, 632 F.2d 504 (5th Cir. 1980) 9

Third National Bank v. Impac Limited, Inc., 432 U.S. 312, 97 S.Ct. 2307 (1977) 16

United States v. Feola, 420 U.S. 671, 95 S.Ct. 1255 (1975) 16, 17

CONSTITUTION AND STATUTES

U. S. CONST. amend. VII 3

Longshoremen's and Harbor Workers' Compensation Act,

33 U.S.C. § 902(3) 4, 9, 11, 19

33 U.S.C. § 902(4) 4, 11, 19

33 U.S.C. § 903(a) 4, 11, 19

MISCELLANEOUS

[1972] 3 U.S. CODE CONG. & AD. NEWS 4707 12

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UNITED STATES DEPARTMENT OF LABOR,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, American Bridge Division, United States Steel Corporation, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on April 15, 1981, as modified in part by that Court, after review of the Director's Petition for Rehearing En Banc, on September 4, 1981, and as further changed in response to the Petition for

Rehearing, or, in the alternative, Motion for Clarification and Modification, filed by American Bridge Division, United States Steel Corporation, on September 22, 1981 (C.A. Nos. 78-1901, 78-1607, 78-1598, 78-1554).

OPINIONS BELOW

The first opinion of the United States Court of Appeals for the Fifth Circuit (C.A. Nos. 78-1901, 78-1607, 78-1598, 78-1554) is entitled *Alford v. American Bridge Division, United States Steel Corporation,* and is reported at 642 F.2d 807. True and correct copies of the original opinion and judgment of the Court of Appeals are appended hereto as "Appendices A-1 and A-2", respectively. The Court of Appeals' next opinion, as modified in part on September 4, 1981, is reported at ____F.2d____. True and correct copies of that opinion and judgment on rehering are attached hereto as "Appendices A-3 and A-4", respectively. The Court of Appeals' final opinion, as changed on September 22, 1981, is reported at ____F.2d ____. A true and correct copy of that opinion is attached hereto as Appendix A-5."

The Benefits Review Board's decisions in the *Alford* and *Buller* cases are reported as follows:

Alford	7 BRBS 484 (1976)
Buller	7 BRBS 481 (1977)

The Benefits Review Board's decision in *Cantu* is unreported. True and correct copies of these decisions are attached hereto as "Appendices B-1, B-2 and B-3", respectively.

The Administrative Law Judge's decisions in the *Alford* and *Buller* cases are unreported. True and correct copies of these decisions are attached hereto as "Appendices

C-1 and C-2", respectively. The Administrative Law Judge's decision in *Cantu* is reported at 6 BRBS (ALJ) 133 (1976). A true and correct copy is attached hereto as "Appendix C-1".

JURISDICTION

The judgment and opinion of the Court of Appeals for the Fifth Circuit was entered on April 15, 1981. Thereafter, the Director, Office of Workers' Compensation Programs, United States Department of Labor, filed a Petition for Rehearing En Banc. The Court of Appeals, after reviewing that Petition, on September 4, 1981, modified its earlier opinion. American Bridge Division, United States Steel Corporation, then filed a Petition for Rehearing, or, in the alternative, Motion for Clarification and Modification, which the Court of Appeals granted to the extent of changing one paragraph of its September 4, 1981 opinion and in all other respects denied, on September 22, 1981. Petitioner's Motion for Stay of Mandate was granted on October 1, 1981. No order has been sought granting an extension of time within which to petition for Certiorari. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§ 1254(1), 2350.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED AND AT ISSUE

1) United States Constitution, Amendment VII:

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, then according to the rules of common law."

2) 33 U.S.C. § 902 *Definitions:*

SEC. 2 When used in this Act—

(3) The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

(4) The term "employer" means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel).

3) 33 U.S.C. § 903(a) *Coverage:*

SEC. 3(a) Compensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing or building a vessel) . . .

STATEMENT OF THE CASE

The facility of American Bridge Division, United States Steel Corporation (hereinafter "American Bridge") in

Orange, Texas comprises approximately eighty-six acres on a Sabine River peninsula. Although this site formerly was a shipyard, at the time of these injuries, American Bridge had not lanuched a vessel there since 1965.

Since 1965, the primary function of American Bridge's plant in Orange, Texas, has been the fabrication of steel components of larger structures such as bridges, steel buildings (including the Astrodome), power plants and petrochemical process vessels.

The Structural Shop, one of five shops in the plant, is the place where steel is fabricated for various uses. This shop may perform operations on several contracts simultaneously, some of which may be sold to a maritime user, and others not.

During the time frame when Alford, Buller and Cantu were injured, completed vessel components ("modules"), before being removed from the Structural Shop, were sold to and accepted by the customer, acting through an agent there for that purpose. American Bridge employees then moved the modules to an area set aside to an independent painting contractor where they were sandblasted and painted. The finished modules then were moved to a loading area at American Bridge's dock, where they were eventually loaded by American Bridge employees and equipment onto the customer's barges. These loaded barges, owned and operated by the customer, were then towed by the customer down the Sabine River into the Gulf of Mexico, and around the tip of Florida into the Atlantic Ocean and then up the east coast of the United States to Brooklyn, New York (in the case of Alford's Module), or to Newport News, Virginia (in the case of Buller's module).

During the same time frame, American Bridge was asked to fabricate a "black diamond" navigational signal for one of the barges to replace the one it had lost or misplaced between trips (Cantu's case).

Alford's Case

John Alford was injured on August 8, 1974, when he struck his back on a steel beam while welding a sub-assembly for a module, which was to become part of an oil tanker, which, ultimately, was to be assembled by Sea Train in Brooklyn, New York.

At the time of Alford's injury, the steel fabrication shop in which he was working was performing work on five contracts, two for Sea Train and three totally non-maritime-related projects.

Alford brought a claim under the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §§ 901, et seq. (hereinafter, "the Act" or "LHW CA"), for compensation benefits. The Administrative Law Judge (hereinafter, "ALJ") found that Alford was a "shipbuilder" within the meaning of § 2(3) of the Act, and that the module was a "fundamental and integral portion of a specific ship."

The Benefits Review Board (hereinafter, "BRB") reversed the ALJ, finding that Alford was not "engaged in maritime employment" within the meaning of § 2(3) of the Act, when injured, because his employer, American Bridge, "did not maintain an ongoing shipbuilding operation".

Buller's Case

Anthony R. Buller was injured on June 29, 1976, while working on a large T-Bar which he was fitting onto

steel plates which would then be welded together and fitted into a finished module. The T-Bar fell on him causing a fracture of his right leg. The module on which Buller was working was being constructed pursuant to a contract with Newport News Shipbuilding and Dry Dock Company in Newport News, Virginia.

Buller brought a claim under the Act for compensation benefits. The ALJ found that he was injured while performing necessary work on a module which was an integral part of a particular ship, reasoning in part that if the claimant had been performing the same work for Newport News Shipbuilding Company, he would unquestionably be a shipbuilder and the fact that he was working for a different employer (half a continent away) did not change the nature of his work or the duties that he was perfoming.

The BRB, setting aside the award of the ALJ, concluded that Buller was not an "employee" within § 2(3) of the Act, in the absence of an ongoing shipbuilding operation by the employer.

Cantu's Case

Hector Cantu, a maintenance welder, was injured on March 4, 1976, when he fell while moving a 75 pound black diamond navigational signal which he was constructing. The signal was to be attached to the top of a barge bound for Newport News. Cantu was a maintenance employee, as distinguished from a production employee, who performed a variety of welding jobs, including maintenance and repair of equipment in the machine shops. His various phobias disqualified him from doing, or from being assigned to, production work.

Cantu filed a claim under the Act for compensation benefits. The ALJ denied his claim, finding that he lacked "employee" status as defined by the Act and that the machine shop where he was injured was not shown to be a situs of shipbuilding work. The ALJ apparently concluded that the machine shop, itself, was not used primarily for shipbuilding or repair work and thus Cantu was not directly involved in an "ongoing shipbuilding operation". The ALJ reasoned that the metal signal flag was not an "integral part of the module section of any vessel, but merely a traffic sign to other users of the waterways."

The BRB affirmed the ALJ's holding as to employee status, and did not comment on the situs question.

Appeal

Alford, Buller and Cantu appealed to the United States Court of Appeals for the Fifth Circuit pursuant to § 21 (c) of the Longshoremen's and Harbor Worker's Compensation Act, (33 U.S.C. § 921(c)).

The Court of Appeals, applying the "status" test, derived from § 2(3) of the Act, (33 U.S.C. § 902(3)), applied the following standards for determining employee status:

1) whether the claimant's activities had a really significant relationship to traditional maritime activities; and,

2) whether the claimant's activities directly furthered the shipbuilding goals of his employer, or were, in essence, an integral part of an ongoing shipbuilding process.

Alford v. American Bridge Division, United States Steel Corporation, 642 F.2d 807, 813 (5th Cir. 1981). It found that Alford and Buller were "employees"—shipbuilders—within the meaning of 33 U.S.C. § 902(3) while fabricating custom-built modules destined to be installed in newly constructed vessels, notwithstanding the undisputed fact that the "ship" would be built at another time, at another place, by another employer, and then it would be launched into another body of navigable water. It further found that module construction was clearly a fundamental, integral and essential step in the process of building vessels, even though the vessels did not and would not exist at or near Orange, Texas and would, in fact, be built by another employer at a far distant place. It found that the character of Cantu's work did not qualify as traditional maritime activity or reach "the level of involvement in the shipbuilding process described as fundamental, integral or essential," and that he did not meet the "employee" test of 33 U.S.C. § 902(3). *Id.* at 813.

Regarding the situs test derived from 33 U.S.C. § 903(a), the Court cited *Texport's Stevedore Co. v. Winchester,* 632 F.2d 504 (5th Cir. 1980), for the proposition that the alleged site must have "some nexus with the waterfront—contiguous to, border upon, close to, near or neighboring". It found that the structural shop at American Bridge met this requirement. It also held that, due to increased reliance on module or assembly line techniques in vessel construction, the presence of a vessel was not necessary to make a shop a situs, that the situs could be "scattered about on the navigable waterways of the continent." *Id.* at 815.

The Court concluded that the geographic location, the plant history and the "on-going operation" of American Bridge in fabricating component parts of vessels, met the situs test. Having been satisfied that the twin tests of status and situs were met, it set aside the BRB's finding against Alford and Buller and granted them coverage under the Act. However, as Cantu had failed to meet the status test embodied in the Act, it affirmed the ALJ and BRB decisions finding non-coverage with respect to him. *Id.* at 816.

The Director, Office of Workers' Compensation Programs, U. S. Department of Labor, filed a Petition for Rehearing En Banc, attacking the denial of coverage under the Act to Cantu. The Court of Appeals, upon reviewing the Director's petition, modified its earlier decision with respect to Cantu, found that, since he was "constantly eligible for assignment" to work on modules he had employee status, and granted him coverage under the Act.

American Bridge, in turn, filed a Petition for Rehearing, or, in the alternative, Motion for Clarification and Modification, based on the Court of Appeals' erroneous statement in the fourth paragraph of the September 4, 1981 opinion that the barge, on which the navigational signal was to be placed, was owned by American Bridge. It was felt that realization of the error might affect the Court of Appeals' decision. It did not, and the Court of Appeals granted American Bridge's petition to the extent of changing the wording of the fourth paragraph so as to correct the erroneous assertion that the barge was owned by American Bridge, but denied it in all other respects.

REASONS FOR GRANTING THE WRIT

I.

The decision and opinion of the Court of Appeals for the Fifth Circuit is in direct conflict with: (a) the congressional intent; (b) the express language of the Act; (c) the recognized rules or principles of statutory construction; and, (d) the Constitution of the United States.

A. Congressional Intent

This is a jurisdictional appeal wherein the ultimate issue boils down to what is, and what is not, "upon the navigable waters of the United States." This in turn evolves into an adjudication of whether or not "building a vessel" means "building a vessel." That is, must there be a vessel at the place (situs) where one is building a vessel? Or, conversely, can one enjoy the status of "builder of a vessel" at a situs where there is, has been, and will be, no vessel being built?

The concepts of "status" and "situs" are found in the Sec. 902(3) definition of "employee" and the Sec. 902(4) definition of "employer"; and are important to this application. More important, however, is the unequivocal limitation of Sec. 903(a) which clearly states:

> Sec. 3(a) Compensation shall be payable under this Act . . . *but only if* the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing or building a vessel). (emphasis added)

The emphasized *"but only if"* language clearly manifests the congressional intent to limit jurisdiction, which is well documented.

The legislative history includes the conclusions of the House Education and Labor Committee found in [1972] 3 U.S. CODE CONG. & AD. NEWS 4707, et seq. The comments upon "Extension of Coverage to Shoreside Areas" begin on page 4707, with the relevant comments appearing on page 4708:

> The Committee believes that the compensation payable to a longshoreman or a ship repairman or builder should not depend on the fortuitous circumstance of whether the injury occurred on land or over water. Accordingly, the bill would amend the Act to provide coverage of longshoremen, harbor workers, ship repairmen, ship builders, shipbreakers, and other employees engaged in maritime employment (excluding masters and members of the crew of a vessel) if the injury occurred either upon the navigable waters of the United States or any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other area adjoining such navigable waters customarily used by an employer in loading, unloading, repairing, or building a vessel.
>
> The intent of the Committee is to permit a uniform compensation system to apply to employees who would otherwise be covered by this Act for part of their activity. To take a typical example, cargo, whether in break bulk or containerized form, is typically unloaded from the ship and immediately transported to a storage or holding area on the pier, wharf, or terminal adjoining navigable waters. The employees who perform this work would be covered under the bill for injuries sustained by them over the navigable waters or on the adjoining land area. The

> Committee does not intend to cover employees who are not engaged in loading, unloading, repairing, or building a vessel, just because they are injured in an area adjoining navigable waters used for such activity.

This Honorable Court reviewed this legislative history and quoted from the foregoing passage in *P. C. Pfeiffer Co., Inc. v. Ford,* 444 U.S. 69, 100 S.Ct. 328, 335-6 (1979), which involved two longshoremen, as distinguished from shipbuilders, as did *Northeast Marine Terminal v. Caputo,* 432 U.S. 249, 97 S.Ct. 2348 (1977). The Fifth Circuit also refers to the foregoing legislative history in footnote 10 of the opinion made the basis of this Appeal, *Alford v. American Bridge Div., U.S. Steel,* 642 F.2d at 815.

Beyond any question, in extending coverage to shoreside areas, the congressional intent was to cover those employees who, in a workday, crossed back and forth over and across the water's edge and thus into and out of LHWCA coverage. That is, before the coverage could "extend" inland, it first had to exist in the adjoining waters (wet waters). The concept that such jurisdiction did not have to "extend" inland from "adjoining" wet water is novel if not unfounded. Surely there was no congressional intent to extend LHWCA coverage to the furniture maker in Grand Rapids, Michigan, the clockmaker in Connecticut or the winchmaker in Oklahoma.

Any thought that these illustrations are far fetched, extreme or beyond reasonable anticipation are dispelled by *Cantu's* claim which, upon reflection, is even more extreme.

Unlike furniture, clocks and winches, which can become an integral part of a vessel, Cantu's black diamond was nothing more than a steel signal flag. If a steel flagmaker is covered, then fabric flagmakers should be also —and all of south Georgia is suddenly an area adjoining navigable water, i.e. a situs.

An early U.S. District Court opinion, *Hite v. Maritime Overseas Corporation*, 375 F.Supp. 233, 235 (E.D. Tex. 1974), quotes E. D. Vickery, "one of the architects of the 1972 amendments" as follows:

> Any shipyard employee, who is actually engaged in the building or repairing of a vessel whether on navigable waters, a marine railway, drydock or other adjoining areas customarily used by an employer for such purposes, is now covered by the Act. The definitions cover only those shipyard employees directly engaged in the physical construction or repair of a vessel, including foremen, supervisors and persons handling parts, pieces and equipment adjacent to the vessel being repaired or built.
>
> Thus, coverage has not been extended to shipyard employees unless a part of their activities is directly involved in the physical building or repairing of a vessel on navigable waters, a drydock, a marine railway or building way. For example, shipyard employees who are engaged ashore fabricating parts or pieces which are to be used by other shipyard employees in the physical building or repairing of a vessel are not covered. This would include those engaged in such jobs as building or fabrication of plates or other items which would be stockpiled or warehoused for use at a later date. Further, by legislative history, it appears clear that Congress did not intend to extend coverage to purely clerical employees or employees engaged solely in moving parts,

pieces or equipment to a storage or warehouse area for subsequent use in building or repairing a vessel.

It is critical to note, again, the words *"adjacent to the vessel* being repaired or built." The whole concept rests upon and emanates from *an adjacent vessel* there being repaired or built. There is no concept, actual or implied, of LHWCA coverage of employees of far away, unrelated manufacturers of component parts who sell to covered "employers". This was never the congressional intent.

B. The Express Language of the Act

STATUS

Neither these claimants nor their employer were shipbuilders. Alford and Buller were steel fabricators of component parts of a vessel being built or to be built at another place at another time by another employer whose shipyard adjoins another body of navigable water. *See Alford,* 642 F.2d at 814. Cantu was a maintenance man not engaged in production. He made a signal flag out of steel in a machine shop that was not involved in the production of modules.

SITUS

Since 1965, the premises in question had not been a shipyard, as no ship had been built there since 1965 and none was being built there at any of the times relevant hereto. The premises were on shore and did not consist of an adjoining area customarily used by an employer in repairing or building a vessel. The only revelant vessels were being built or were to be built at another place at another time by other employer whose shipyards adjoin another body of navigable water.

Call them what one will: components, parts, modules, sub-assemblies, or whatever; they would not float. They were, at best, fabricated steel objects. They were not vessels and they were not ships. Singularly or collectively they were not "a vessel". American Bridge clearly was not building "a vessel" at Orange, Texas. These men were not injured on the navigable waters of the United States (including any other adjoining area customarily used by American Bridge in building a vessel).

The only "vessels" built by American Bridge since 1965 had been pressure vessels, towers if one will, used at refineries and petrochemical plants. Any confusion occasioned by this terminology is unfortunate, but insignificant.

The amendment to the LHWCA designed to extend coverage to a class of workers which theretofore would have been covered during part but not all of a workday, clearly contemplated, envisioned and intended an area or situs adjacent to *a vessel* there being built. In *Alford,* LHWCA jurisdiction did not come ashore from adjoining wet water jurisdiction because there was no such wet water jurisdiction there to come ashore from; there was no vessel there being built by American Bridge; and none was there customarily built by American Bridge.

C. Recognized Rules or Principles of Statutory Construction

The old Latin terms "ejusdem generis" and "noscitur a sociis" are unnecessary to reach the conclusion that words grouped in a list should be given related meaning. *Third National Bank v. Impac Limited, Inc.,* 432 U.S. 312, 322, 97 S.Ct. 2307, 2313 (1977), citing *United States v. Feola,* 420 U.S. 671, 708, 95 S.Ct. 1255, 1275

(1975) (Stewart, J., dissenting). "Pier", "wharf", "dry docks", "terminals", "building way", "marine railway", all describe places to which a floating vessel may be brought or from which a vessel may be floated. Each requires (a) the existence and (b) the presence of a vessel which is, or which is to be, afloat. That is, the inland extension of LHWCA jurisdiction depends upon an "in being" "right there" vessel—a whole vessel—one that can float on water—wet water.

It strains any principle of statutory construction to excise or abolish the concept of a vessel (in being and present) from "other adjoining area." This is particularly so when, as here, the statute concludes with the specific denominative, "a vessel".

The Court below sought to overcome this requirement by use of "navigable water" rather than "a vessel". However, the Sabine River was navigable for all purposes except that of receiving a vessel being built by American Bridge. The navigable water into which the subject vessels ultimately were to be launched were not the Sabine River, and its presence at Orange Texas in proximity to American Bridge's fabrication shop did not convert the plant into a shipyard.

D. The Constitution of the United States

LHWCA can come ashore constitutionally only pursuant to admiralty or maritime jurisdiction. Otherwise the parties, or any of them, are entitled to a trial by jury. The express provisions of the Seventh Amendment to the United States Constitution read, in pertinent part as follows: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved. . . ."

If the Act applies to the furniture maker in Michigan, the clock maker in Connecticut, the winchmaker in Oklahoma, or the module and component part maker in Orange, Texas, then, to the extent that it deviates from constitutional maritime jurisdiction, to that extent, it denies these entities their constitutional right to trial by jury. Petitioner, American Bridge contends that when the admiralty jurisdiction of the LHWCA reaches the above-mentioned entities, it has been stretched to an unconstitutional extreme.

II.

The Court of Appeals for the Fifth Circuit has decided an important federal question which has not been, but should be, settled by this court.

This jurisdictional appeal presents for the first time an opportunity for this Court to consider the unresolved "shipbuilder", as distinguished from "longshoremen", aspect of the inland extension of Longshoremen's and Harbor Worker's Compensation Act jurisdiction or coverage. This Court now has written twice upon "longshoremen" jurisdictional issues, but has not yet directly considered the "shipbuilder" jurisdictional issue. (Perdue, Skipper and Nulty, parties to the original *Jacksonville Shipyards/P. C. Pfeiffer* litigation [*Jacksonville Shipyards, Inc. v. Perdue*, 539 F.2d 533 (5th Cir. 1976)[1]], were in the "shipbuilder" category, but the several decisions—after *Caputo*—address only Bryant and Ford who were longshoremen.)

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1. For subsequent history of all five cases, *see Alford*, 642 F.2d at 814, n.9.

The longshoremen cases, while analogous to shipbuilder cases, rely upon the word "terminal" in that Act. There is no comparable word such as "shipyard", only "adjoining area customarily used by an employer in building a vessel". Therefore, while a longshoreman might work in a terminal far removed from the vessel being unloaded, a "shipbuilder" still requires the presence of an adjacent vessel being built for there to be coverage.

The claimants in *Caputo* and *Ford* were all longshoremen. This Court has not yet considered any "shipbuilders", particularly "shipbuilders" who were nowhere near a place where a vessel was being built.

Nor has this Court considered a case where the claimants worked for an employer other than the shipbuilder.

The interplay of employee status, employer status, employer situs and situs generally, as found in § 902(3) and § 903(4) and § 903(a) of the Act, deserve the definition and resolution herein prayed by Petitioner, American Bridge.

CONCLUSION

The Court below in essence has held that status now is irrelevant since those who do not enjoy status are "constantly eligible for assignment to that task"—i.e. have potential status. That, of course, includes everyone.

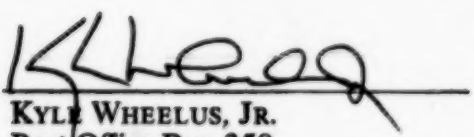
The Court below likewise, in essence, has held that situs now is irrelevant since "the allged site must (only) have some nexus with the (a) waterfront". If the water is used to transport raw materials or finished products, that is enough. The court freely admits and states (642 F.2d at 815) that a covered situs can be "scattered about on the navigable waterways of the continent".

Petitioner asserts that in each of these determinations, the Court below has gone too far, and that this Court should define the concepts of status and situs in keeping with the language of the statute, the established rules and principles of legislative construction, and, most importantly, in keeping with the avowed and undisputed legislative intent, preserving the Constitutional right to trial by jury elsewhere.

PRAYER

For all the reasons set forth above herein, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,



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Of Counsel:

WELLER, WHEELUS & GREEN

APPENDIX A-1

John K. ALFORD, Anthony R. Buller, Hector Cantu and Director, Office of Workers' Compensation Programs, United States Department of Labor, Petitioners,

v.

AMERICAN BRIDGE DIVISION, UNITED STATES STEEL CORPORATION, Respondent.

Nos. 78-1901, 78-1633, 78-1607, 78-1601, 78-1598 and 78-1554.

United States Court of Appeals, Fifth Circuit

April 15, 1981.

Three claimants appealed from a decision of the Benefits Review Board denying them coverage under the Longshoremen's and Harbor Workers' Compensation Act. The Court of Appeals, Brown, Circuit Judge, held that: (1) employees engaged in steel fabrication of custom-built modules designed to be installed in newly constructed vessels were "shipbuilders" within the purview of the Act; (2) an employee who engaged in maintenance welding and welding navigational barge signals required by the Coast Guard was not a "shipbuilder" within purview of the Act; and (3) the employer's steel fabrication facility was a "situs" covered by the Act, in light of its geographic

location, the plant history, and the ongoing operation of the employer in fabricating component parts of vessels.

Affirmed in part; reversed in part.

* * *

Stephenson, Thompson & Dies, Martin W. Dies, Orange, Tex., Louis Bien, Galveston, Tex., Schechter & Shelton, Michael Shelton, Houston, Tex., Stanley K. George, Port Arthur, Tex., Carin A. Clauss, Sol. of Labor, Laurie M. Streeter, Associate Sol., Mary A. Sheehan, Joshua T. Gillelan and Gilbert T. Renaut, U.S. Dept. of Labor, Washington, D.C., for petitioners.

Kyle Wheelus, Jr., Beaumont, Tex., for respondent.

Petitions for Review of Orders of the Benefits Review Board.

Before BROWN, GEWIN and POLITZ, Circuit Judges.

JOHN R. BROWN, Circuit Judge:

Claimants, John Alford, Anthony Buller and Hector Cantu, employees of American Bridge, appeal from decisions by the Benefits Review Board (BRB) which denied them coverage under the Longshoremen's and Harbor Workers' Compensation Act (LHWCA). Our review for legal errors compels us to reverse the BRB and affirm the Administrative Law Judge (ALJ) with respect to Alford and Buller, and affirm the ALJ and BRB with respect to Cantu.

The A.B.C.'s of this Case—Alford, Buller and Cantu

This appeal, brought by worker compensation claimants —Alford, Buller and Cantu—and the Director, Office of

Worker's Compensation Programs, pursuant to the LHWCA 33 U.S.C.A. §§ 921(c), 901-905, requires us to review three final orders of the BRB excluding the claimants from LHWCA coverage. In reversing the findings of two ALJs and affirming another, the BRB found that the claimants were not "engaged in maritime employment" within the meaning of § 2(3) of the LHWCA, 33 U.S.C.A. § 902(3)[1] because their employer, American Bridge, "did not maintain an ongoing shipbuilding operation." *Jacksonville Shipyards, Inc. v. Perdue,* 539 F.2d 533, 539-40, 544 (5th Cir. 1976), *Halter Marine Fabricators, Inc. v. Nulty,* 539 F.2d 533 *cert. denied,* 433 U.S. 908, 97 S.Ct. 2973, 53 L.Ed.2d 1092 (1977) (Nulty's case). The legal conclusions reached in these conflicting findings requires us to concentrate our efforts on the proper construction and interpretation of the terms "employee" and "employer" as used in coverage §§ 902, 903 of the LHWCA.

[1-4] We are limited in our review to considering errors of law and making certain that the BRB adhered to its statutory standard of review of factual determinations. *Mississippi Coast Marine v. Bosarge,* 637 F.2d 994 at 996 (5th Cir. 1981). By statute, the BRB is required to apply the same standard of review as that which was formerly applied by the District Court in reviewing

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(3) The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net. 33 U.S.C. § 902(3) (1976).

compensation orders. 33 U.S.C.A. § 921(b)(3) (Supp. III, 1973); *see also*, 20 CFR § 802.301 (1973); 20 CFR § 801.104 (1977). That is, the factual findings of the ALJ must be accepted unless inconsistent with the law or unsupported by substantial evidence in the record as a whole. *Fulks v. Avondale Shipyards, Inc.*, 637 F.2d 1008 at 1011 (5th Cir. 1981); *Presley v. Tinsley Maintenance Service*, 529 F.2d 433 (5th Cir. 1976). *See also Base Billeting Fund, Etc. v. Hernandez*, 588 F.2d 173 (5th Cir. 1979); *Army & Air Force Exchange Service v. Greenwood*, 585 F.2d 791 (5th Cir. 1978); *Equitable Equipment Co., Inc. v. Hardy*, 558 F.2d 1192 (5th Cir. 1977); *Alabama Dry Dock & Shipbuilding Co. v. Kininess*, 554 F.2d 176 (5th Cir.), *cert. denied*, 434 U.S. 903, 98 S.Ct. 299, 54 L.Ed.2d 190 (1977). Further, the ALJ's selection of conflicting inferences which seem most reasonable are conclusive. *Cardillo v. Liberty Mutual Ins.*, 330 U.S. 469, 67 S.Ct. 801, 91 L.Ed. 1028 (1947). It likewise follows that since the BRB's function is more akin to that of a District Court, unlike other agency's policy-making bodies, there is little rationale for our affording a deference to its construction of legislation pertaining to the LHWCA.[2] *Hastings v. Earth Satellite Corp.*, 628 F.2d 85, at 94 (D.C. Cir. 1980); *Pittston Stevedoring Corp. v. Dellaventura*, 544 F.2d 35, 48-50 (2d Cir. 1976) *aff'd. sub nom., Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 97 S.Ct. 2348, 53 L.Ed.2d 320 (1977).

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2. In cases of conflict between the exclusively adjudicating Board and the Administrative delegate of the Secretary, such deference as is owed to the agency construction belongs to the Director since he has the administrative responsibilities under the LHWCA which are the source of the weight to be given a statutes "agency" construction. *Cf.* CFR § 802.410(b) (1977).

To Be or Not to Be a Shipyard?

The facts which gave rise to these claims are uncontroverted. American Bridge's division in Orange, Texas, comprises approximately 86 acres on a Sabine River peninsula. This facility was formerly a shipyard, but American Bridge has not launched a vessel there since 1965.[3] Its primary function since that time has been to fabricate steel components of larger structures including not only vessels, but also bridges, steel buildings, and power plants. When custom built modules for vessels weighing several tons each are completed, they are loaded onto ocean-going barges in the Sabine—making their final destination by sea either to Sea Train in New York or to Newport News Shipbuilding in Virginia.

A. Alford's Case

John Alford was injured on August 8, 1974, when he struck his back on a steel beam while welding a subassembly for a module on an oil tanker in the process of being assembled at Sea Train in Brooklyn, New York. He was immediately transported to the hospital in Orange,

3. From all accounts American Bridge's history is one with roots in shipbuilding. The plant began operation in the early part of 1940 having acquired the inactive facilities of the old Orange Car and Steel Company. Initially, operations were on six acres of land. At that time, the company was known as Consolidated Steel Corporation of Texas. Parts for structural steel buildings were fabricated in one building. In late 1940, the Texas Company obtained a contract to build 12 destroyers for the United States Navy and the company added a division, Consolidated Steel Corporation, Ltd., Shipbuilding Division. A complete shipyard plant was constructed by filling in the remaining 50 acres of surrounding marshland. The shipbuilding division of the Texas Company ceased operations after building over 200 naval vessels for the government. The facilities were purchased by United States Steel Corporation in 1950 and in 1955 placed under the management of American Bridge Division.

but returned to work that day following examination and treatment. He continued to complain of back pains until his last day of work, August 21, 1974. Alford eventually underwent back surgery, but he has not returned to work at American Bridge.

At the time of Alford's injury, the steel fabrication shop where he was injured was engaged in five projects; two for Sea Train and three non-maritime projects. This shop is located 300 feet east of the nearest water and 1,000 feet west of where the 80 ton modules are loaded onto the barges.

The ALJ analogized Alford's situation to the shipbuilding worker, *"Nulty"* in *Jacksonville Shipyards,* 539 F.2d at 539, finding that Alford was a "shipbuilder" within the meaning of § 2(3) (*see* n.1 *supra*) of the LHWCA and the module was a "fundamental and integral portion of a specific ship". The BRB reversed on the rationale that there could not be an "ongoing shipbuilding operation" where the employer did not assemble the vessel itself.

B. Buller's Case

Anthony Buller was injured on June 29, 1976, when a large T-Bar which he was fitting onto steel plates to be welded together fell causing a fracture in his right leg. His module was destined for Newport News. During his three years with American Bridge, Buller had spent about 95 percent of his time working on component parts for vessels and in repairing barges afloat on the Sabine River which were owned and used by American Bridge to ferry materials across the peninsula. The shop where

Buller worked is approximately 150 yards from the Sabine.

The ALJ likewise concluded that Buller qualified as an "employee" under the LHWCA and that he was covered because he was injured while performing necessary work from a blueprint on a module which was an "integral part of a particular ship".[4] The BRB again reached contra results based on the reasoning it expressed in Alford's case.

C. Cantu's Case

Hector Cantu, a maintenance welder, suffered injuries on March 4, 1975, when he fell while moving a 75 pound black diamond signal which he was constructing. The black diamond was to be attached to the top of a barge bound for Newport News. Navigational rules of the U. S. Coast Guard require black diamonds to be attached to tops of barges as daytime indicators when the barges are towing loads exceeding 600 feet. Cantu performed a variety of welding jobs, including maintenance and repair of equipment in the machine shops as well as work on Sea Train barge modules.

The ALJ denied Cantu's claim, finding that he lacked "employee" status as defined by the LHWCA and that the machine shop where he was injured was not shown to be a situs of shipbuilding work. The ALJ reasoned

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4. In holding that Buller was an "employee" under LHWCA, the ALJ reasoned in part:

> If the claimant was performing the same work for Newport News Shipbuilding Company, the question would not even arise as to whether the claimant was a shipbuilder. The fact that he was working for a different company does not change the nature of his work or the duties that he was performing.

Vol. I No. 78-1554 at 72.

that the metal signal flag was not an "integral part of the module section of any vessel, but merely a traffic sign to other users of the waterways." The ALJ also apparently concluded that the machine shop itself, unlike the structural fabrication shops, was not used primarily for shipbuilding or repair work and thus Cantu was not directly involved in an "ongoing shipbuilding operation." The BRB affirmed the ALJ's holding of employee status, but did not comment on the situs question.

The One, Two, Three's of Coverage

With the hoisting of these review *standards* and facts we launch our discussion with an examination of the jurisdictional requirements controlling coverage claims under the LHWCA. In order to be covered, (i) claimants must have "employee" status as defined in 33 U.S.C.A. § 902(3) (*see*, n.1 *supra*), (ii) American Bridge must have been claimant's "employer" as defined in 33 U.S.C.A. § 902(4)[5] and (iii) alleged injury must have occurred on "navigable waters" within the meaning of that term in 33 U.S.C.A. § 903(a).[6]

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5. A statutory employer is
an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel).
33 U.S.C. § 902(4) (1976).
American Bridge concedes that it is an "employer" as defined by this section based on longshoring activities of their barges.

6. § 903. Coverage
(a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining

The 1972 Amendments—Full Steam Ahead?

[5] There can be no doubt that when Congress passed the 1972 amendments to the LHWCA, it intended to effectuate a uniform compensation system to be applied regardless of whether those working in maritime commerce sustained injury on a vessel or adjoining work areas of navigable waters. From a reading of §2(3) LHWCA, the claimants to be covered as employees must be shipbuilders. (*See,* n.1 *supra*). In fact, the resolution of this case in the final analysis depends in substantial measure upon the scope and definition of the word "shipbuilding" because the claimants must have been building a ship (status) in an area adjoining navigable waters used by his employer for shipbuilding (situs). In specifically designating "shipbuilders" as a distinct group of covered employees in the new amendments, Congress was using the word shipbuilder as a general term for application to diversified situations and intended to extend the benefits of the LHWCA to all shipbuilders injured in specified areas. However, because Congress did not intend to extend coverage to *all* who happened into a maritime area, the 1972 amendments added the "status" requirement to the already existing, but now shoreward extended "situs" tests.

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pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading unloading, repairing, or building a vessel). No compensation shall be payable in respect of the disability or death of—

(1) A master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net; or

(2) An officer or employee of the United States or any agency thereof or of any State or foreign government, or of any political subdivision thereof.

A. Status

Much judicial ink has been applied in attempting to construe the scope of "employee" status. One of the most recent articulations by the Supreme Court in this matter, *P. C. Pfeiffer Co., Inc. v. Ford,* 444 U.S. 69, 100 S.Ct. 328, 62 L.Ed.2d 225 (1979), focuses on the employee's occupations in terms of workers who perform "some portion of an integral part of a maritime activity" such as cargo loading/unloading or ship repairs. *Pfeiffer,* 444 U.S. at 75, 100 S.Ct. at 333, 62 L.Ed.2d at 231; accord *Texports Stevedore Co. v. Winchester,* 632 F.2d 504 at 511 (5th Cir 1980) (en banc). *Pfeiffer* was in part a confirmation of a prior Supreme Court opinion, *Northeast Marine Terminal v. Caputo,* 432 U.S. 249, 97 S.Ct. 2348, 53 L.Ed.2d 320 (5th Cir. 1977) where the Court had found checkers and terminal laborers covered who performed only a part of what would otherwise indisputably have been an integral "ongoing maritime activity." In keeping with Congressional intent,[7] the Court reasoned that it is

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7. The Committee believes that the compensation payable to a longshoreman or a ship repairman or builder should not depend on the fortuitous circumstance of whether the injury occurred on land or over water. Accordingly, the bill would amend the Act to provide coverage of longshoremen, harbor workers, ship repairmen, ship builders, shipbreakers, and other employees engaged in maritime employment (excluding masters and members of the crew of a vessel) if the injury occurred either upon the navigable waters of the United States or any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other area adjoining such navigable waters customarily used by an employer in loading, unloading, repairing, or building a vessel.

The intent of the Committee is to permit a uniform compensation system to apply to employees who would otherwise be covered by this Act for part of their activity. To take a typical example, cargo, whether in break bulk or containerized form, is typically unloaded from the ship and immediately transported to a storage or holding area on the pier, wharf, or terminal

not "the procedure [or] the place of performance of the work that is determinative, but the *character* of work." *Caputo*, 432 U.S. at 268, 97 S.Ct. at 2359, 53 L.Ed.2d at 335, (emphasis applied).

In attempting to defeat the present claimant's alleged status, American Bridge initially argues that the "character" of the work here—fabrication—is not specifically mentioned in LHWCA nor "uniquely maritime" as that of longshoring which was found to be covered in *Pfeiffer* and *Caputo*. American Bridge focuses on the employer status to negate employee status by stressing the fact that it is a steel fabricator engaged in all types of steel fabrication. Hence, claimant's work was similar if not identical to unrelated fabrication carried on in the same shop. A similar line of reasoning was recently expressed and rejected in *Bosarge*, where it was argued that because (i)

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adjoining navigable waters. The employees who perform this work would be covered under the bill for injuries sustained by them over the navigable waters or on the adjoining land area. The Committee does not intend to cover employees who are not engaged in loading, unloading, repairing, or building a vessel, just because they are injured in an area adjoining navigable waters used for such activity. Thus, employees whose responsibility is only to pick up stored cargo for further transshipment would not be covered, nor would purely clerical employees whose jobs do not require them to participate in the loading or unloading of cargo. However, checkers, for example, who are directly involved in the loading or unloading functions are covered by the new amendment. Likewise the Committee has no intention of extending coverage under the Act to individuals who are not employed by a person who is an employer, i.e. a person at least some of whose employees are engaged, in whole or in part in some form of maritime employment. Thus, an individual employed by a person none of whose employees work, in whole or in part, on navigable waters, is not covered even if injured on a pier adjoining navigable waters.

H.Rep.No.92—1441, 92d Cong., 2d Sess. 10-11 (1972); S.Rep. No. 92—1125, 92d Cong., 2d Sess. 12-13 (1972), *reprinted in* [1972] U.S. Code Cong. & Ad. News 4698, 4707-08.

carpenters were not specifically mentioned in the LHWCA and (ii) claimant's general work activities were similar to those performed by land-based carpenters, that claimant/carpenters should not be classified as maritime employees. *Bosarge,* 637 F.2d at 996-998. The Court based its holding on the logic expressed in two other recent Fifth Circuit cases, *Odom Construction Co., Inc. v. United States Department of Labor,* 622 F.2d 110 (5th Cir. 1980) and *Trotti & Thompson v. Crawford,* 631 F.2d 1214 (5th Cir. 1980). In *Odom* an employee was injured while relocating fallen concrete blocks used for mooring barges and other vessels. The Court found LHWCA coverage because the job being performed clearly had a "realistically significant relationship to 'traditional activity involving navigation and commerce on navigable waters' ". *Odom,* 622 F.2d at 113, *quoting Weyerhause Co. v. Gilmore,* 528 F.2d 957, 961 (9th Cir. 1975). *Trotti* involved a land-based carpenter who was injured while constructing a pier. The Court awarded LHWCA benefits because the claimant's activities constituted maritime employment and thus met the status requirement, *Trotti,* 631 F.2d at 1623. Equally supportive is our landmark decision of *Alabama Dry Dock v. Kininess,* 554 F.2d 176 (5th Cir.) *cert. denied,* 434 U.S. 903, 98 S.Ct. 299, 54 L.Ed.2d 190 (1977) where we responded to the argument that a claimant who was engaged in sand-blasting a crane which was to be used in longshoring activities was not directly involved in shipbuilding because the crane which he was sandblasting had not yet been assembled. Rejecting this argument, the Court concluded that sand-blasting "was an essential aspect of the employer's ship repairing and shipbuilding enterprise . . . and that [m]aintenance of the crane was

necessary to enable it to perform its eventual function of hauling fabricated ship sections to the water's edge. *Kininess,* 554 F.2d at 178. *See, e.g., Ingalls Shipbuilding Corp. v. Morgan,* 551 F.2d 61, 62 (5th Cir. 1977) (deceased claimant covered while cleaning a steel plate that would later be used for construction or repair of ships);[8] *McCarthy, Inc. v. Bradshaw,* 547 F.2d 1161 (3d Cir. 1977) (fork-lift repairman covered); *Dravo Corp. v. Maxin,* 545 F.2d 374, 376 (3d Cir. 1976) (injured claimant covered while burning steel plates which would ultimately become bottoms and decks of barges); *Jacksonville Shipyard, Inc. v. Perdue,* 539 F.2d 533 (5th Cir. 1976) (shipyard carpenters building wood piece designed to hold a spare wheel directly involved in an ongoing shipbuilding operation).

[6] Judged by these standards for determining employee status as whether claimant's activities (i) had a really significant relationship to traditional maritime activities, (ii) directly further the shipbuilding goals of his employer or were, in essence, an integral part of an ongoing shipbuilding process, we affirm the ALJ's findings that Alford and Buller were "employees"—shipbuilders—within the meaning of 33 U.S.C.A. § 902(3) while fabricating custom-built modules destined to be installed in newly constructed vessels. Significantly, these modules were not interchangeable with any other type of fabricated steel which the company manufactures. This mod-

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8. The Court in that case concluded:
Morgan's cleaning task was an essential step of the shipbuilding process, and it defies plain meaning of the words "ongoing shipbuilding operation" to restrict them to activities that relate to vessels that are already floating.
Morgan, 551 F.2d at 62.

ule construction was clearly a fundamental, integral and *essential* step in the process of building vessels.

[7] On the other hand, we do not find "employee" status in the case of Cantu. Even though it may be argued that he performs important tasks in maintenance welding and welding navigational barge signals which are required by the Coast Guard, we do not think this "character" of work qualifies as traditional maritime activity or reaches the level of involvement in the shipbuilding process described as *fundamental, integral* or *essential.* It was neither an integral part of or a module section to a vessel such as those Alford and Buller had worked on, nor an integral part of a barge which would carry these modules. Rather, it was merely to be used in maritime commerce as a navigational traffic sign and we find this use too tenuous a connection to shipbuilding or ship repairing as required under the LHWCA. Because Congress did not define or apparently intend to specifically delineate the extent and scope of the term "shipbuilder" in the LHWCA, the Courts must necessarily draw these lines of inclusion. We do so here by finding that the particular facts of Cantu's case do not allow LHWCA recovery.

B. Situs

Besides adding the status requirement for LHWCA coverage, the 1972 amendments broadened recovery by moving the situs line of coverage shoreward to include not only the traditional injuries on "navigable waters" but "any injury occurring upon any adjoining pier, dry dock, terminal, . . . or any other adjoining area cus-

tomarily used by an employer in loading, unloading, repairing, or building a vessel". 33 U.S.C.A. § 903(a) (*see*, n.6 *supra*). Thus, in order to qualify for LHWCA coverage, the claimants must be located at a proper situs as outlined above. However, just what and where the situs boundary lines are—specifically what constitutes an "adjoining area"—has been and continues to be a subject of much judicial debate. One thing is clear, we have, at least for the present, continued to require a geographic component—the presence of navigable waters—as a situs requisite. *Pfeiffer*, 444 U.S. at 78, 100 S.Ct. at 335, 62 L.Ed.2d at 233.

[8] American Bridge's location on the Sabine River, without question, facially meets this geographic requirement of navigable waters. In addition, as brought out at the administrative hearing for Buller, this location was not merely incidental but essential to American Bridge's business. Mr. Hale, a company witness, testified that there was no other reasonable way to transport the large vessel modules except by water. Further, there is little doubt based on the decisions of this Circuit that the fabrication shops where Alford and Buller worked were within the boundaries of "adjoining areas customarily used by an employer in . . . building a vessel." (*See* n. 5 *supra*). In *Kininess*, we found a back shipyard lot located some 150 to 2,000 feet from the water's edge constituted an adjoining area. "The test is whether the situs is within a contiguous shipbuilding area which adjoins the water. * * * Furthermore, the lot itself was 'customarily used' for the maintenance and repair work . . . [i]t was an area in which work directly related to shipbuilding was taking place." *Kininess*, 554 F.2d at 178. In *Nulty* one of the

five cases[9] decided in *Jacksonville Shipyards*, 539 F.2d 533, we found the situs for a carpenter injured at a shipyard fabrication shop located some 300 feet from the vessel under construction. In a second case, *Perdue*, the Court found situs lacking where the injury occurred at an administrative office because the "locus of this injury was not customarily used or involved in loading, unloading, building or repairing vessels." *Perdue*, 539 F.2d at 541-42. However, the Court was quick to disclaim that the non-maritime character of nearby buildings is *not* a conclusive test for determining LHWCA situs jurisdiction and the better requirement is to look at all the factors and circumstances. *Id.* Recently, in *Texport's Stevedore Co. v. Winchester*, 632 F.2d 504, at 511 (en banc) [1980] the Court made the further disclaimer that the situs question should *not* be based totally on the presence or absence of intervening or surrounding maritime facilities. Instead, the alleged site must have some nexus with the waterfront—contiguous to, border upon, close to, near or neighboring. *Texports*, 632 F.2d at 514. The Court concluded that a broader interpretation was not

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9. The five cases are *Jacksonville Shipyards, Inc. v. Perdue*, 539 F.2d 533, *vacated and remanded*, 433 U.S. 904, 97 S.Ct. 2967, 53 L.Ed.2d 1088 (1977), *aff'd on remand*, 575 F.2d 79 (5th Cir. 1978), *cert. denied*, 440 U.S. 967, 99 S.Ct. 1520, 59 L.Ed.2d 784 (1979) (Blackmun, J., dissenting) (*Perdue*), *Jacksonville Shipyards, Inc. v. Skipper*, 533 F.2d 533 (*Skipper*), *P. C. Pfeiffer Co., Inc. v. Ford*, 539 F.2d 533, *vacated and remanded*, 433 U.S. 904, 97 S.Ct. 2966, 53 L.Ed.2d 1088 (1977), *aff'd on remand*, 575 F.2d 79 (5th Cir. 1978) *aff'd*, 444 U.S. 69, 100 S.Ct. 328, 62 L.Ed.2d 225 (1979) (*Ford*); *Halter Marine Fabricators, Inc. v. Nulty*, 539 F.2d 533, *cert. denied*, 433 U.S. 908, 97 S.Ct. 2973, 53 L.Ed 2d 1092 (1977) (*Nulty*); *Ayers Steamship Co. v. Bryant*, 539 F.2d 533, *vacated and remanded*, 433 U.S. 904, 97 S.Ct. 2967, 53 L.Ed.2d 1088 (1977), *aff'd on remand*, 575 F.2d 79 (5th Cir. 1978), *aff'd sub nom. P. C. Pfeifer Co., Inc. v. Ford*, 444 U.S. 69, 100 S.Ct. 328, 62 L.Ed.2d 225 (1979) (*Bryant*).

only within the spirit of the Congressional purposes of the 1972 amendments but its objectives for providing uniform benefits and covering land-based maritime activity as well. *Id.*

The gear room which was held covered in *Texports* was located approximately five blocks from the gate of the nearest Houston Port dock. *Texports,* 632 F.2d at 507. Based on this aspect of situs and our discussion of case law, we have no trouble in finding situs for fabrication shops at the American Bridge plant. However, this is not the principal argument American Bridge makes concerning the situs issue. American Bridge presents the argument that 33 U.S.C.A. § 903(a) (*see* n.1 *supra*) clearly requires the presence of a vessel to make a situs. Because American Bridge did not construct the entire vessel or completely assemble and launch it in or adjacent to navigable waters, the statutory requirement could not be satisfied in the present case. They try to persuade us that the BRB correctly held that it does not constitute "shipbuilding" to fabricate a module that will be put into and become a part of a ship to be built at *another* place at *another* time by *another* employer whose shipyard adjoins navigable waters.

Such a restrictive approach to the situs requirement is not supported by the language of the LHWCA, case law or the underlying congressional purpose prompting the drafting of the LHWCA 1972 amendments. The requirement of a vessel *per se* at the proposed situs as American Bridge suggests is not mandated by any section of the LHWCA. In fact the act defines "vessel" to mean

> any vessel upon which *or in connection with which* any person entitled to benefits under this chapter

> suffers injury or death arising out of or in the course of his employment, and said vessel's owner, owner pro hac vice, agent, operator, charter, or bare boat charter, master, officer, or crew member. (emphasis applied)

33 U.S.C.A. § 902(21).

Persuasive also is claimant's analogy between the segmentation of the shipbuilding process and discontinuity injected into the process of loading and unloading vessels. The *Blundo* case discussed in the Supreme Court decision of *Caputo*, 432 U.S. at 253-71, 97 S.Ct. at 2351-2361, 53 L.Ed.2d at 326-337, provides a particularly convincing parallel to the present facts. There, the "stripping" or unloading of containers during which Blundo's injury occurred involved two employers and separate waterfront facilities which ultimately necessitated intermediate transportation of the containers. The Court emphatically rejected the contention that the stripping operation was not a part of a maritime process of unloading the ship, finding it nevertheless to be "clearly an integral part of the unloading process as altered by the advent of containerization," *Caputo*, 432 U.S. at 271, 97 S.Ct. at 2361, 53 L.Ed.2d at 337, and explained:

> We find no significance in the fact that the container Blundo was stripping had been taken off a vessel at another pier and been moved to the site of the injury. Until the container was stripped, the unloading process was clearly incomplete, the only geographical concern Congress exhibited was that the operation take place at a covered situs. See Part IV, [432 U.S. at 279-81, discussing the § 3(a) situs requirement]. It was precisely Congress' intent to accommodate the

> mobility of containers and the ability to transport and strip them at locations removed from the ship.

Caputo, 432 U.S. at 271 n.33, 97 S.Ct. at 2361 n.33.

The Court's perception of the Congressional intent relevant to *Blundo's* case is generally applicable as well to the factual situation presented in our cases. As the congressional committee reports reflect,[10] the amendments were an effort in part to adapt coverage to an increasing modernized and technological society of which containerization is illustrative in the cargo-handling industry. Equally appropriate is the analogy of module or assembly line techniques in vessel construction. By identical reasoning products which were once produced from start to finish in one plant are now contracted out to "specialized" manufacturers and then shipped to a final assembly point. Present day realities and a changing economy have altered the picture of the traditionally centrally located American Shipyard operation into an "ongoing process of shipbuilding" scattered about on the navigable waterways of the continent. The Third Circuit has expressly adopted

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10. It is also to be noted that with the advent of modern cargo-handling techniques, such as containerization and the use of LASH-type vessels, more longshoring work is performed on land than heretofore.

* * * * * *

The Committee believes that the rights of an injured longshoreman or shipbuilder or repairman should not depend on whether he was employed directly by the vessel or by an independent contractor. H.R.Rep.No. 92-1441, 92d Cong. 2d Sess. 10, *reprinted in* [1972] U.S. Code Cong. & Ad. News 4698, 4705, 4707-08. In this connection we comment that newport News and Sea Train both have the capability to completely construct a vessel, yet, they chose to contract out the construction of modules furnishing American Bridge blueprints and materials. The business relationship between these two was therefore, that of contractor and subcontractor.

this concept in *Dravo Corp. v. Maxin*, 545 F.2d 374 (3d Cir. 1976), *cert denied*, 433 U.S. 908, 97 S.Ct. 2973, 53 L.Ed.2d 1092 (1977) which involved an assembly-line barge and towboat construction process in which the fabrication shop made large component sections of vessels and sent them on rail cars to another portion of the shipyard where they were assembled into completed vessels by other workers.

Reviewing our case in light of these considerations, we conclude that the geographic location, the plant history and the "on-going operation" of American Bridge in fabricating component parts of vessels, meets the situs test. Moreover, having already found that claimants Alford and Buller satisfied the status requirement for LHWCA jurisdiction, we are satisfied that the twin test of status and situs have now been met and accordingly, we set aside the BRB's finding against Alford and Buller and now grant them coverage, but affirm the ALJ and BRB's finding of non-coverage with respect to Cantu.

AFFIRMED IN PART; REVERSED IN PART.

APPENDIX A-2

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NOS. 78-1901, 78-1633, et al

BRB 76-430, et al

JOHN K. ALFORD, ANTHONY R. BULLER, HECTOR CANTU and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
Petitioners,

versus

AMERICAN BRIDGE DIVISION, UNITED STATES STEEL CORP.,
Respondent.

Petitions for Review of Orders of the
Benefit Review Board

Before BROWN, GEWIN and POLITZ, Circuit Judges.

JUDGMENT

These causes came on to be heard on the petitions of John K. Alford, Anthony R. Buller, Hector Cantu, et al, for review of orders of the Benefit Review Board, and were argued by counsel;

ON CONSIDERATION WHEREOF, It is here ordered and adjudged by this Court that the Orders of the Benefit Review Board in these causes be, and the same are hereby affirmed in part, and reversed in part;

IT IS FURTHERED ORDERED that the petitioners be condemned to pay one-third of the costs on appeal to be taxed by the Clerk of this Court; and that respondent be condemned to pay two-thirds of said costs.

APRIL 15, 1981

ISSUED AS MANDATE:

APPENDIX A-3

John F. ALFORD, Anthony R. Buller, Hector Cantu and Director, Office of Workers' Compensation Programs, United States Department of Labor, Petitioners,

v.

AMERICAN BRIDGE DIVISION, UNITED STATES STEEL CORPORATION, Respondent.

Nos. 78-1901, 78-1633, 78-1607, 78-1601, 78-1598 and 78-1544.

UNITED STATES COURT OF APPEALS

Fifth Circuit

Sept. 4, 1981

After affirming denial of coverage under the Longshoremen's and Harbor Workers' Compensation Act, 642 F.2d 807, the Court of Appeals, on petition for rehearing en banc, held that claimant, who sustained injuries while constructing a 75-pound black diamond navigational signal which was to be attached to a barge loaded with vessel modules, had employee status under Longshoremen's and Harbor Workers' Compensation Act and was therefore entitled to compensation for his injuries.

Modified in part.

* * *

Petitions for Review of Orders of the Benefits Review Board.

ON PETITION FOR REHEARING

Before BROWN, GEWIN* and POLITZ, Circuit Judges.

PER CURIAM:

In our original decision, *Alford v. American Bridge Division, U. S. Steel Corp.*, 642 F.2d 807 (5th Cir. 1981), we affirmed the Administrative Law Judge (ALJ) and Benefits Review Board's (BRB) denial of coverage under the Longshoremen's and Harbor Workers' Compensation Act (LHWCA) to Hector Cantu for injuries which he sustained while he was constructing a seventy-five pound black diamond navigational signal which was to be attached to an American Bridge barge loaded with vessel modules. A careful review of the Petition for Rehearing En Banc which attacks this denial, convinces us that we made an error with respect to that portion of the decision. In all other respects our decision remains unaffected.

We originally held that Cantu did not qualify as a covered "employee" under the Act because the construction of the black diamond did not "qualif[y] as traditional maritime activity or reac[h] the level of involvement in the shipbuilding process described as *fundamental, inte-*

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* Due to his death on May 15, 1981, Judge Gewin did not participate in this decision. The case is being decided by a quorum. 28 U.S.C. § 46(d).

gral or *essential.*" *Alford,* 642 F.2d at 813. Rather, the marker "was merely to be used in maritime commerce as a navigational traffic sign and we find this use too tenuous a connection to shipbuilding or ship repairing as required under the LHWCA." *Id.*

A reconsideration of the principles of "maritime employment status" developed in prior decisions, persuades us that Cantu is entitled to coverage. Recently, *Trotti & Thompson v. Crawford,* 631 F.2d 1214 (5th Cir. 1980), and many other past decisions of the Supreme Court and this Court have held that making and maintaining facilities and items of equipment for loading and unloading vessels[1] and for building them[2] are covered operations. *Trotti* involved a land-based carpenter who was injured while constructing a pier—a facility essential to maritime commerce. The Court there reasoned that:

> Although we minimize their importance, both [dry docks and piers] are aids to maritime commerce and are used in support of navigation even though

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1. The following cases exemplify the various types of recovery allowed. *Texports Stevedore Co. v. Winchester,* 554 F.2d 245 (5th Cir. 1977), *reaf'd en banc,* 632 F.2d 504 (1980), (stevedoring gear); *Odom Construction Co. v. United States Department of Labor,* 622 F.2d 110, 113 (5th Cir. 1980), *cert. denied,* __U.S.__, 101 S.Ct. 1482, 67 L.Ed.2d 614 (1981) (mooring blocks used for barges awaiting stevedoring services at nearby wharf).

2. *Alabama Dry Dock & Shipbuilding Co. v. Kininess,* 554 F.2d 176 (5th Cir.), *cert. denied,* 434 U.S. 903, 98 S.Ct. 299, 54 L.Ed.2d 190 (1977) (maintaining parts of shipyard crane, not yet assembled but stored and intended for future use in building vessels); *Ingalls Shipbuilding Corp. v. Morgan,* 551 F.2d 61, 62 (5th Cir. 1977) (injured while cleaning a piece of steel to prepare it for fabrication into a shipbuilding component).

> the analogy to traditional aids to navigation is a little far-fetched.

Trotti, 631 F.2d at 1219 (emphasis added).

Even more recently, we have canvassed the many cases in *Hullinghorst Industries v. Carroll*, 650 F.2d 750, 751 (5th Cir.). Since the black diamond navigational signal was essential for a tow exceeding 600 feet in length and was being constructed for installation on an American Bridge Barge to be used in transporting ship modules to the shipyard in the East, the activity was sufficiently related to maritime commerce as to be maritime employment.

We now find that the analogy between a black diamond navigational signal, which is required by the U.S. Coast Guard as a daytime indicator on barges towing 600 feet or more, and traditional "aid to navigation" is not so "tenuous" as to deny Cantu LHWCA benefits.

In addition we find Cantu within the perimeters of "employee status" based on the principles announced by the Supreme Court in *P.C. Pfeiffer Co., Inc. v. Ford*, 444 U.S. 69, 100 S.Ct. 328, 62 L.Ed.2d 225 (1979), which emphasizes that in defining "employee status" the crucial factor is the nature of the activities which a worker *may be assigned." Pfeiffer*, 444 U.S. at 82, 100 S.Ct. at 337. (Emphasis added). *See also Howard v. Rebel Well Service*, 632 F.2d 1348, 1350 (5th Cir. 1980) ("*Caputo* defines status in terms of workers who spend 'at least some of their time' in ship repair"; claimant "was a member of a crew of workers who regularly performed some portion of the traditionally maritime activity of ship

repair, thus he was constantly *eligible for assignment* to that task");[3] *Thibodaux v. Atlantic Richfield Co.*, 580 F.2d 841, 844 (5th Cir. 1978), *cert. denied*, 442 U.S. 909, 99 S.Ct. 2820, 61 L.Ed.2d 274 (1979).

Finding that Cantu falls within the foregoing principles delineating "employee status" under the LHWCA, we vacate that portion of the decision which originally denied his benefits.

MODIFIED IN PART.

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3. In *Howard*, the claimant was employed as a sandblaster and painter at a yard which performed minor repairs on navigable floating barges. Claimant testified that he "mostly" worked on equipment removed from barge rigs and brought to the yard. Although his superior at the yard testified that equipment from the barge rigs comprised only about ten percent of work assigned to the sandblasting crew, the Court found claimant a covered employee under the Act.

APPENDIX A-4

UNITED STATES COURT OF APPEALS
For The Fifth Circuit

October Term, 1981

Nos. 78-1901, 79-1633, et al

BRB 76-430, et al

JOHN K. ALFORD, ANTHONY R. BULLER, HECTOR CANTU and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
Petitioners,

versus

AMERICAN BRIDGE DIVISION, UNITED STATES STEEL CORP.,
Respondent.

Petitions for Review of Orders of the Benefit Review Board

Before BROWN, GEWIN and POLITZ, Circuit Judges.

JUDGMENT ON REHEARING

These causes came on to be heard on the petitions of John K. Alford, Anthony R. Buller, Hector Cantu, et al, for rehearing;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the petition for rehearing is granted in part and denied in part and the decision of this Court of April 15, 1981 is modified in part in accordance with the opinion of this date;

IT IS FURTHER ORDERED that the respondents pay to the petitioners the costs on appeal to be taxed by the Clerk of this Court.

SEPTEMBER 4, 1981

ISSUED AS MANDATE:

APPENDIX A-5

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 78-1901, et al.

JOHN K. ALFORD
and
ANTHONY R. BULLER
and
HECTOR CANTU
and
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
Petitioners,

versus

AMERICAN BRIDGE DIVISION, U.S. STEEL CORP.,
Respondents.

Petition for Review of an Order of the Benefits Review Board

Before BROWN, GEWIN* and POLITZ, Circuit Judges.

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* Due to his death on May 15, 1981, Judge Gewin did not participate in this decision. The petition for rehearing is being decided by a quorum, 28 U.S.C. 46(d).

BY THE COURT:

IT IS ORDERED that respondent's petition for rehearing, or, in the alternative, motion for clarification and modification of the Court's opinion entered on September 4, 1981 is *GRANTED* to the extent of changing this portion of the fourth paragraph to read:

> Since the black diamond navigational signal was . . . essential . . . and was being constructed for installation on barge to be used in transporting ship modules to the shipyard in the East, the activity was sufficiently related to maritime commerce as to be maritime employment.

In all of other respects it is *DENIED*.

APPENDIX B-1

U.S. DEPARTMENT OF LABOR
Benefits Review Board
Washington, D.C. 20210

BRB No. 76-430

DECISION

JOHN K. ALFORD
Claimant-Respondent

v.

AMERICAN BRIDGE DIVISION,
U.S. STEEL CORPORATION
Employer-Petitioner

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR
Party-in-Interest

January 20, 1978

Digest Section 1806

Syllabus

A welder injured in Texas while welding a module to be fiitted into a vessel to be constructed in New York, in the course of his duties for an employer which fabricated steel parts also for buildings and bridges, was not engaged in an ongoing shipbuilding operation. Thus, the Board reverses a decision that claimant was a shipbuilder engaged in maritime employment within the meaning of Longshoremen's Act Section 2(3).

p. 489

Appeal from the Decision and Order of Robert E. Duncan, Administrative Law Judge, United States Department of Labor.

Kyle Wheelus, Jr. (Weller, Wheelus & Green), Beaumont, Texas, J. T. Morriss (U.S. Steel Corporation), Houston, Texas, and Raymond Sullivan (U.S. Steel Corporation), Dallas, Texas, for the employer.

Louis Bien (Schechter & Shelton), Houston, Texas, for the claimant.

Joshua T. Gillelan, II (Carin Ann Clauss, Solicitor of Labor, Laurie M. Streeter, Associate Solicitor), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH, Chairman and MILLER, Member.

SMITH, Chairman:

This is an appeal by the employer from the Decision and Order (76-LHCA-293) of Administrative Law Judge Robert E. Duncan in a claim filed pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq.* (hereinafter referred to as the Act).

Claimant began working for the employer in February or March of 1974. The employer operates a steel fabrication facility at Orange, Texas. Claimant started his work with the employer as a tacker. Subsequently, he attended welding school which was offered by the employer and he worked as a welder. On August 8, 1974, claimant was welding in the Structural Shop at employer's Orange, Texas, facility. Claimant was bent over welding pieces of steel together when he heard the meal-time whistle blow. Claimant straightened up, striking his back on a steel beam. He sought medical treatment at a hospital. After he had been examined and diagnosed, claim-

ant returned to work and finished working that day, but he was unable to work the following day because of pain in his back. When he returned to work several days later, claimant informed his employer that he was having a problem with his back. During the following two weeks, claimant was treated by several doctors, but continued to attend the welding school offered by his employer. Claimant has not worked since August 21, 1974. On January 21, 1975, claimant "underwent a decompressive lumbar laminectomy a with removal of the spine and lamina of L4 and L5. A herniated nucleus pulposus at the L5-S1 level was found and removed."

The Structural Shop is one of five shops in the employer's 86 acre facility which is located on a peninsula in the Sabine River at Orange, Texas. The primary function of the Structural Shop is to fabricate steel. The employer's business includes the manufacture of large diameter pipe and the fabrication of steel which is used in bridges, buildings, tanks, and ship components. Employer's Orange facility was used for ship construction during World War II and subsequently for the construction of cargo barges, pressure vessels, missile hulls and tanks. The employer has not launched a vessel from its Orange facility since September 1965. Employer's marine ways are in disrepair and cannot be used for launching a vessel.

On August 8, 1974, employer's Structural Shop was performing work on several contracts. Two of these contracts were for Sea Train Corporation. At the time of his injury, claimant was working on one of the Sea Train projects. He was welding part (a sub-assembly) of an 80 ton module which was later sent by a barge owned by

Sea Train Corporation to a Sea Train Corporation shipyard in Brooklyn, New York, where it was to be assembled as a component of an oil tanker. These modules are an integral and necessary part of a designated tanker.

The Structural Shop is 300 feet from navigable water on one side and 1000 feet from the barge loading area on the other side. The Sabine River is a navigable water way. Employer also employs longshoremen for the loading and unloading of barges at its Orange facility.

The administrative law judge found that claimant is an employee as that term is used in Section 2(3) of the Act, 33 U.S.C. Section 902(3), in that claimant was working as a shipbuilder at the time of his injury; that employer comes within the definition of an employer as set forth by Section 2(4) of the Act, 33 U.S.C. § 902(4); that claimant was injured on a situs as defined in Section 3(a) of the Act, 33 U.S.C. § 903(a); that since August 8, 1974, claimant has been and continues to be temporarily totally disabled: that claimant's attorney S. Bennett Sharber is entitled to an attorney's fee in the amount of $2,500.00 for services rendered on behalf of the claimant before the administrative law judge; that claimant is entitled to six percent interest on unpaid installments of past due compensation, computed from the date each installment was originally due; and that employer is responsible for the payment of a ten percent penalty on each unpaid installment.

Employer appeals alleging that this claim does not come within the coverage of the Act in that the alleged injury did not occur upon the navigable waters of the United States and claimant was not then and there an employee within the meaning of Section 2(3) of the Act;

that there is not substantial evidence in the record considered as a whole to support the administrative law judge's finding of a causal relationship between claimant's injury and his employment, or a finding that claimant is temporarily totally disabled; that there is no evidence in the record to support an award of an attorney's fee; and that a Section 14(e) penalty, 33 U.S.C. § 914 (e), is not proper since this issue was never raised before the administrative law judge.

The resolution of this appeal turns on whether claimant was an employee within the meaning of Section 2(3) of the Act. This case arises in the Fifth Circuit and is controlled by the law of that circuit. We will discuss the controlling cases as we think they apply to the present fact situation.

In *Jacksonville Shipyards, Inc. v. Perdue,* 539 F.2d 533 (5th Cir. 1976), *vacated and remanded in part sub nom. Director, OWCP v. Jacksonville Shipyards, Inc.,* ____U.S.____, 97 S.Ct. 2967 (1977), the court held that "an injured worker is a covered 'employee' if at the time of his injury (a) he was performing the work of loading, unloading, repairing, building, or breaking a vessel, or (b) although he was not actually carrying out these specified functions, he was 'directly involved' in such work."

In *Halter Marine Fabricators, Inc. v. Nulty, decided with Perdue, supra, cert. denied,* ____U.S.____, 97 S.Ct. 2973 (1977), the court applied its general holding, which is set forth in the previous paragraph, to the case of an employee who worked as a carpenter at employer's shipyard fabrication shop. In finding Nulty covered within the meaning of Section 2(3) of the Act, the court stated

that Nulty was directly involved in an "ongoing shipbuilding operation" and was therefore entitled to compensation under the Act.

The U.S. Court of Appeals for the Fifth Circuit again used this concept of an "ongoing shipbuilding operation" to find a claimant's deceased husband, who worked as a shipfitter helper apprentice in a fabrication shop in the employer's shipyard, covered by the Act. Workers in the shop cut, shaped, tacked and welded steel parts which were later used for the construction and repair of ships at the same facility. *See Ingalls Shipbuilding Corp. v. Morgan,* 551 F.2d 61 (5th Cir. 1977).

In *Alabama Dry Dock & Shipbuilding Co. v. Kininess,* 554 F.2d 176 (5th Cir. 1977), the court found an employee who was engaged in the maintenance of a crane to be within the coverage of the Act because his job was an essential aspect of the employer's ship repair and shipbuilding enterprise. Maintenance of the crane was necessary to enable the employer to perform the eventual function of hauling fabricated ship sections to the water's edge. The court noted that the employee's job directly furthered the shipbuilding goals of his employer.

From our reading of these cases, it is clear to us that an employee must be engaged in, or directly involved in, an "ongoing shipbuilding operation" in order to come within the coverage of Section 2(3) of the Act.

If we apply the Fifth Circuit's "ongoing shipbuilding operation" test to the facts of this case, we must conclude that the claimant, John K. Alford, is not a covered employee within the meaning of Section 2(3) of the Act. In this case, claimant worked as a welder for an employer

which is in the steel fabrication business. The employer made structural steel parts for everything from the Superdome in New Orleans, Louisiana, to component modules for vessels which were destined for incorporation into the final assembly of a vessel in New York or Virginia, to steel structures for bridges. The employer does not maintain, and has not maintained, a shipbuilding facility at its Orange, Texas, plant since 1965. The employer does not perform any aspect of shipbuilding other than the fabrication of component modules which are to be assembled, along with other modules, into a complete vessel by other companies in New York or Virginia. Employer does not have the capability or the facilities at its Orange, Texas, plant to perform the various stages required in constructing a vessel.

In *Dravo Corp. v. Maxin*, 545 F.2d 374 (3d Cir. 1976), the court discussed some of the techniques used in modern day ship construction. The court cited 20 Encyclopaedia Britannica 410-13 (1967), under the heading "Steps In Constructing A Ship", which states that:

> Fabrication and Assembly. The plate and angle shop shears, acetylene torch equipment, planers, bending rolls, presses, furnaces, drill and counter-sink machines and other equipment prepare the finished steel plates and shapes ready for subassembly or for erection in the ship. After fabrication, the plates and shapes, if riveted, are usually moved directly to the ship by cranes; shipwrights then adjust them in final positions and secure them by a few bolts passed through the rivet holes.

Employer did not run the type of operation described in the preceding quotation or anything approaching it.

We are convinced by the facts of this case that the employer did not maintain an "ongoing shipbuilding operation." Thus, we conclude that claimant, who was not injured as he worked in an "ongoing shipbuilding operation", does not come within the coverage of the Act.

Having concluded that claimant does not come within the coverage of the Act, the other issues raised in this appeal are rendered moot.

Claimant's attorney has submitted a detailed fee request for services rendered on behalf of claimant before the Board. Successful defense of an appeal before the Board is required as a precondition to the Board's awarding an attorney's fee. *See* 20 C.F.R. § 702.134(b). Thus, the claimant's attorney is not entitled to a fee as a result of his unsuccessful defense of this appeal before the Board.

Accordingly, the Board reverses the Decision and Order of the administrative law judge and vacates the award of benefits to the claimant.

Dated this 20th day
of January, 1978

APPENDIX B-2

U.S. DEPARTMENT OF LABOR
Benefits Review Board
Washington, D.C. 20210

BRB No. 77-578

DECISION

ANTHONY R. BULLER
Claimant-Respondent

v.

AMERICAN BRIDGE DIVISION,
U.S. STEEL CORPORATION
Employer-Petitioner

January 19, 1978

Digest Section 1806

Syllabus

An employee for a steel fabricator injured in Texas while working on a component to be fitted into a vessel to be constructed in Virginia was not then engaged in maritime employment within the meaning of Longshoremen's Act Section 2(3).

Appeal from the Decision and Order of Vernon C. Field, Administrative Law Judge, United States Department of Labor.

Kyle Wheelus, Jr., (Weller, Wheelus & Green), Beaumont, Texas, for the employer.

Martin W. Dies (Stephenson, Thompson & Dies), Orange Texas, for the employer.

Before: SMITH, Chairman, and MILLER, Member.

SMITH, Chairman:

This is an appeal by the employer from the Decision and Order (77-LHCA-568) of Administrative Law Judge Vernon C. Field in a claim filed pursuant to the provisions of the Longshoremen's and Harbor Worker's Compensation Act, as amended, 33 U.S.C. § 901 *et seq.* (hereafter referred to as the Act).

The claimant was employed by the employer as a helper and was classified as a steel fabricator. The claimant's duties were to place and fit pieces of steel onto other pieces of steel as required by blue prints so that these pieces of steel could be welded later. Most of his working time was spent performing this function. On June 29, 1976, the claimant was working at his regular duties. He was fitting large T-bars onto steel plates. As he was doing this, one of the T-bars slipped and fell, fracturing the claimant's right leg. At the time of his injury, the claimant was performing work on a subassembly which was later to become part of a module destined for incorporation into a vessel by Newport News Shipbuilding and Drydock Company in Newport News, Virginia.

The claimant recovered from his injury and returned to work for the employer. However, approximately six weeks later on December 3, 1976, he slipped and fell, again fracturing his right leg at the identical place of the initial fracture. This injury did not arise out of and in the course of the claimant's employment. The claimant's initial injury occurred in the central shop at the employer's Orange, Texas, steel fabrication plant. A more detailed discussion of the operation and facilities maintained by the employer at its Orange, Texas, plant are contained in the administrative law judge's Decision and Order.

The administrative law judge found that the claimant comes within the meaning of the term "employee" as set forth in Section 2(3) of the Act, 33 U.S.C. § 902(3); that the injury occurred upon a situs which comes within the meaning of Section 3(a) of the Act, 33 U.S.C. § 903(a); that the claimant sustained periods of temporary total disability from June 29, 1976, to October 25, 1976, and from December 3, 1976, to April 16, 1977; that the claimant has a ten percent permanent partial loss of use of his right leg; that the employer shall pay to the claimant six percent interest per annum on the balance of compensation which is owed to him, computed from the date that such payment was originally due until the date of actual payment; that the employer shall pay an additional ten percent penalty in accordance with the provisions of Section 14(e) of the Act, 33 U.S.C. § 914(e); and that the claimant's attorney is entitled to a fee of $750.00 for services rendered on behalf of the claimant before the administrative law judge.

The employer appeals alleging that the claimant was not an employee within the meaning of Section 2(3) of the Act and therefore does not come within the coverage of the Act, that the alleged injury did not occur upon the navigable waters of the United States as defined in Section 3(a) of the Act, and that the administrative law judge erred in awarding compensation for the subsequent injury and its consequences when such subsequent injury was wholly unrelated to the claimant's employment and was in no way sustained on a covered situs or while the claimant occupied the status of a covered employee.

The resolution of this appeal is controlled by the Board's recent decision in *Alford v. American Bridge Di-*

vision, __BRBS__, BRB No. 76-439 (January , 1978). In that Decision, the Board resolved the "status" issue raised by the employer in this appeal. Having reviewed the record and the arguments made by the parties to this appeal, we conclude that the claimant is not an employee within the meaning of Section 2(3) of the Act and so does not come within the coverage of the Act.

Therefore, the employer's second contention, involving the compensability of the claimant's second injury, is rendered moot. Accordingly, the Decision and Order of the administrative law judge is reversed and the award of benefits to the claimant is hereby vacated.

Dated this 19th day
of January, 1978

APPENDIX B-3

U.S. DEPARTMENT OF LABOR
Benefits Review Board
Washington, D.C. 20210

BRB No. 77-445

DECISION

HECTOR CANTU, SR.
Claimant-Petitioner

v.

AMERICAN BRIDGE DIVISION,
U.S. STEEL CORPORATION
Employer-Respondent

February 21, 1978

Appeal from the Decision and Order of Julius A. Johnson, Administrative Law Judge, United States Department of Labor.

Stanley K. George, Port Arthur, Texas, for the claimant.

Kyle Wheelus, Jr. (Weller, Wheelus & Green), Beaumont, Texas, J.T. Morriss (U.S. Steel Corporation), Houston, Texas, and Raymond Sullivan (U.S. Steel Corporation), Dallas, Texas, for the employer.

Before: SMITH, Chairman, and MILLER, Member.

PER CURIAM:

This is an appeal by the claimant from the Decision and Order (76-LHCA-884) of Administrative Law Judge Julius A. Johnson in a claim filed pursuant to the provisions of the Longshoremen's and Harbor Workers' Com-

pensation Act, as amended, 33 U.S.C. § 901 *et seq.* (hereinafter referred to as the Act).

The claimant was employed by the employer as a maintenance welder in its machine shop where he performed many diverse welding jobs. His duties mainly involved the maintenance and repair of machines and equipment. In addition, he was responsible for the correction of improper welding done by other employees. On March 4, 1975, claimant suffered an injury when he fell from a table while attempting to move a navigational signal which weighed approximately seventy-five pounds. Claimant had constructed this signal by welding four triangular metal plates together so that they formed a 33 sq. in. diamond figure. In accordance with United States Coast Guard regulations, this diamond figure was to be painted black and placed where it could best be seen on a barge which would carry module sections stacked on top of each other to a shipbuilder in Newport News, Virginia where these modules would become part of a ship. Claimant's injury was sustained at the employer's Orange, Texas, steel fabrication plant. A detailed discussion of the operation and facilities maintained by the employer at its Orange, Texas plant is contained in the administrative law judge's Decision and Order.

The administrative law judge found that the claimant was not engaged in maritime employment within the meaning of Section 2(3) of the Act, 33 U.S.C. § 902(3), and that the claimant's injury did not occur upon navigable waters within the meanings of Section 3(a) of the Act, 33 U.S.C. § 903(a). Accordingly, the claim was denied because of the lack of jurisdiction under the Act.

The claimant appeals alleging that the claimant was an employee within the meaning of Section 2(3) of the

Act and that the alleged injury occurred upon the navigable waters of the United States as defined in Section 2(a) of the Act.

The resolution of this appeal is controlled by the Board's recent decision in *Alford v. American Bridge Division,* BRBS , BRB No. 76-430 (Jan. 20, 1978). In *Alford,* the Board concluded that a welder in American Bridge's structural shop was not an employee under the Act in that American Bridge did not maintain an "ongoing shipbuilding operation." Therefore, the claimant did not meet the test laid down by the U.S. Court of Appeals for the Fifth Circuit, adopted by this Board, that a claimant be engaged in, or directly involved in an "ongoing shipbuilding operation" in order to come within the coverage of Section 2(3) of the Act. The reasoning expressed in *Alford* is clearly applicable to the claimant in the instant case. Therefore, having reviewed the record and the arguments made by the parties to this appeal, the Board concludes that the claimant is not an employee within the meaning of Section 2(3) of the Act and that he does not come within the coverage of the Act.

Having concluded that the claimant does not come within the coverage of the Act, we also conclude that the "situs" issue raised by the claimant is rendered moot.

Accordingly, the Decision and Order of the administrative law judge is affirmed.

/s/ SAMUEL J. SMITH
Samuel J. Smith, Chairman

/s/ JULIUS MILLER
Julius Miller, Member

Dated this 21st day of February, 1978.

SERVICE SHEET

BRB No. 77-445: HECTOR CANTU, SR. v. AMERICAN BRIDGE DIVISION U.S. STEEL CORPORATION (Case No. 76-LHCA-884)

A copy of this Decision was sent to the following parties:

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APPENDIX C-1

U.S. DEPARTMENT OF LABOR
Office of Administrative Law Judges
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Case No. 76-LHCA-293

OWCP No. 8-24423

In the Matter of:

JOHN K. ALFORD
Claimant

v.

AMERICAN BRIDGE DIVISION,
U.S. STEEL CORPORATION,
Employer

SELF-INSURED

September 13, 1976

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For the Self-Insured Employer

Before: ROBERT E. DUNCAN
Administrative Law Judge

DECISION AND ORDER

Statement of the Case

John K. Alford, Claimant, brings this claim, arising under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901, ("Act") for compensation benefits. A hearing was held in Beaumont, Texas, on February 26, 1976. The parties were represented by Counsel and were afforded full opportunity to be heard, adduce evidence, call, examine and cross-examine witnesses, make oral argument and submit post hearing briefs. The briefs filed by the parties and the application for attorney's fee submitted by Counsel for Claimant are made a part of the record.

The issues for decision are the following:

1. Whether the claim is within the provisions of the Act;

2. Whether the Claimant has sustained a disabling injury and if so the nature and extent of such injury; and

3. Whether Claimant's attorney is entitled to receive a reasonable attorney fee to be paid by the Employer.

Based upon the entire record in this case, including the exhibits and testimony adduced, and from my observation of the witnesses, and their demeanor, I make the following Findings of Fact, Conclusions of Law and Order.

Findings of Fact and Conclusions of Law

Counsel for the Claimant and the Employer have stipulated, and I so find, that Claimant's average weekly

wage at the time of the alleged injury on August 8, 1973, was $153.00 (Tr. 5, 14).[1]

1. On August 8, 1974, Claimant, in his employment was subject to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 902(3), 902(4) and 903(a).

Three sections of the Act control whether a claim is within its coverage. In order to satisfy these jurisdictional requirements, Claimant, on August 8, 1974—the date of the alleged injury—must have been an "employee" as that term is used in Section 2(3) of the Act, 33 U.S.C. 902 (3); American Bridge Division, U.S. Steel Corporation must have been his "employer" as defined in Section (2)(4) of the Act, 33 U.S.C. 902(4) and the alleged injury must have occurred on "navigable waters" within the meaning of that term in Section 3(a) of the Act, 33 U.S.C. 903(a).

In February or March 1974, Claimant started employment with the Employer at its Orange, Texas Plant. Claimant initially worked as a tacker, helping a fitter. Later, he worked as a welder and periodically attended the Employer's welding school. On August 8, 1974, Claimant was working at the Plant in the Employer's Structural Shop. He was bent over, welding portions of steel members together, when he heard the whistle for mealtime. He straightened up and struck his back on a nearby steel beam (Tr. 14-15, 31). He stopped work

1. Counsel for the Employer has requested that the transcript of the February 26, 1976, hearing be corrected in certain particulars. The requested corrections are set forth in Appendix I of the Employer's brief received on March 31, 1976. The request is granted and the transcript will be so corrected.

and went to a hospital in Orange, Texas. After examination and treatment at the hospital, he returned to work and worked the rest of the day. The next day he did not attempt to work because his back was too painful. The following Monday he reported for work and advised the Employer he was having trouble with his back. Claimant continued to attend the Employer's welding school and was seen by doctors. August 21, 1974, was the last day he worked. Surgery was performed on his back and because of continuous back pain and pain in his legs he has not worked since August 21, 1974 (Tr. 16-17, 20-21; Res. Ex. 8).

The Structural Shop where Claimant was injured is located on the property of the Orange, Texas Plant of the American Bridge Division, U.S. Steel Corporation. The Plant occupies a peninsula of the Sabine River and consists of approximately 86 acres of land (Tr. 40; Res. Ex. 3).

The Plant began operations in the early part of 1940 having acquired the inactive facilities of the old Orange Car and Steel Company. Initially, operations were on 6 acres of land. At that time, the Company was known as Consolidated Steel Corporation of Texas ("Texas Company") a wholly owned subsidiary of Consolidated Steel Corporation of Los Angeles. In the one small building available, parts were fabricated for structural steel buildings, bridges, *etc.* The remaining 80 acres were low marsh-like land.

The Texas Company obtained a contract to build 12 Destroyers for the U.S. Navy in late 1940. To handle this work a new company was formed, the Consolidated Steel Corporation, Ltd., Shipbuilding Division. The newly

formed company was also a subsidiary of Consolidated Steel Corporation of Los Angeles. The remaining 80 acres of the peninsula were reclaimed by filling them in with sand and dirt dredged from the Sabine River. A complete shipbuilding plant was constructed. Ships such as Destroyers, Destroyer Escorts, and LCI Landing Vessels were built under contract with the U.S. Navy. A total of 238 Naval Vessels were constructed and delivered. (T. 40-41).

The Shipbuilding Division stopped operations after the end of World War II, and part of the facilities and 20-acres of land were sold to the U.S. Navy. At the latter part of 1946, the Shipbuilding Division was closed and taken over by the War Assets Administration (Tr. 42).

During this entire period, the Texas Company continued to operate as a separate corporation. The parent company after its acquisition of the facilities of Western Pipe and Steel Company changed its name to Consolidated Western Steel Corporation. In 1948, U.S. Steel Corporation purchased the assets of the parent company and the name of the enterprise was changed to Consolidated Western Steel Division, U.S. Steel Corporation.

In 1950, the facilities and acreage of the former Shipbuilding Division were acquired by U.S. Steel Corporation and operations at the Orange Texas Plant were expanded to include the construction and use of a large diameter pipe mill as well as continued fabrication of structural steel for bridges, buildings, tanks, pressure vessels, missile hulls, and cargo barges.

In 1955, the Orange Texas Plant of Consolidated Western Steel Division, U.S. Steel Corporation, was placed

under the management of the American Bridge Division, U.S. Steel Corporation and today operates under that name. At the present time, the Plant's marine ways are in disrepair and cannot physically be used for launching. The last launching occurred in September 1965 (Tr. 44-45; Res. Ex. 4).

The American Bridge Division has been in the structural and plate steel construction and fabrication business for over a half a century and has worldwide operations. The firm is perhaps the largest in the world performing structural and plate steel fabrication and erection. U.S. Steel corporation is the largest steel producer in the nation (Tr. 40-41; Res. Ex. 3, pp. 1-2).

The Structural Shop is one of the five shops in the Plant. Its primary function is to fabricate steel for various uses. The process of handling steel in the Structural Shop is, except for particular contract specifications, basically the same regardless of the completed product (Tr. 81). Material is brought to the Structural Shop by truck, rail or barge. It is unloaded and stored in the Receiving Yard until needed and identified by contract. The Preassembly Department orders material from the yard by contract. It is cut to size and holes are drilled or punched. Detail material is made first and held in storage. Main material is then prepared. When the processing of the material, which is either plate or structural steel or both, is completed by the Preassembly Department the main material is sent to the Fitting Department. The Fitting Department then orders the detail for the prepared main material they have received. The materials are placed on fitting skids and fitted. At times, by use of a large machine, both fitting and welding can be performed in the same opera-

tion. After the pieces are fitted and inspected they are welded as needed. When the completed items are passed by inspectors, they are sent to yard storage until ordered by another department (Tr. 71-81; Res. Ex. 10).

On August 8, 1974, the date of Claimant's accident the Structural Shop was performing operations on several contracts. There were three structual jobs and two jobs for Sea Train Corp. (Tr. 85; Res. Ex. 10 p. 3).

Claimant was working on one of the Sea Train projects when he was hurt. He was in the Structural Shop welding a flat bar to a large piece of steel (Tr. 15). A cardboard model of the steel part is in evidence as an exhibit (Res. Ex. 1). The piece of steel Claimant was working on was a part of a module section which was later shipped to Sea Train Corporation in New York. When completed at the Employer's plant the shipping modules, or shipping units, (Tr. 100) have an average weight each of eighty tons (Tr. 106). These modules prepared by the Employer are loaded on barges for shipment to the Sea Train shipyard. At the shipyard in New York, the modules are to be combined to form the main deck, tanks and structures of a large oil tanker. The finished oil tanker will be approximately 1,100 feet long, 140 feet wide, 90 feet in depth and consist of over 33,000 tons of steel. The units or modules built by the Employer are an integral and necessary part of the particular tanker (Tr. 116-117).

Claimant is an "employee" as that term is used in the Act. As defined in Section 2(3) of the Act, 33 U.S.C. § 902(3) an "employee" means:

> * * * any person engaged in maritime employment, including any longshoreman or other person engaged

> in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

In the case at bar the application of the Act to Claimant and his injury at work rests, in part, upon whether or not he was working as a "shipbuilder" at the time of the injury. The term "shipbuilder" is not directly defined in the Act. Its meaning, accordingly, is to be derived from "the context of the particular use of the term and the object to be accomplished by the enactment under consideration," *South Chicago Co. v. Bassett*, 309 U.S. 251, 259 (1940). See also *Puerto Rico v. Shell Company*, 302 U.S. 253, 258 (1937).

Shipbuilders were expressly named as covered employees by the 1972 amendments to the Act. Prior to 1972 shipbuilders were within the coverage of the Act as maritime employees if they were injured at work on navigable waters (including any dry dock). Before the 1972 amendment maritime employees working on a wide range of types and sizes of ships were held to be covered by the Act. Examples include such workers on railroad car floats, *Nogueira v. N.Y., N.H. & H.R. Co.*, 281 U.S. 128, 130 (1930); motorboats, *Parker v. Motor Boat Sales*, 314 U.S. 244, 245 (1941); barges, *Avondale Marine Ways v. Henderson*, 346 U.S. 366 (1953); and oil drilling barges, *Calbeck v. Travelers Insurance Co.*, 370 U.S. 114, 115 n.2 (1962).

By amending the Act in 1972 and identifying shipbuilders as a distinct group of covered employees, Con-

gress was using the word "shipbuilder" as a general term for application to diversified situations and was extending the benefits of the Act to all shipbuilders injured in specified areas. In keeping with its goal to provide uniform treatment to all those engaged in the occupation, if the other conditions in the Act are present, all shipbuilders are covered, those directly building the ship where it is to be launched and those who can reasonably be regarded as engaged in building an essential portion of a ship to be completed and launched at a later time and at a different place.

The custom-built modules Claimant was building when he was injured have no other purpose but to be incorporated in the specific oil tanker. The units are directly related to the oil tanker. Take away the modules and the oil tanker would not be possible.

Where a worker's duties pertain to "an essential part of the overall construction of vessels which his employer was in the business of building;" the Claimant is a shipbuilder and therefore is "engaged in 'maritime employment' within the meaning of Section 2(3) of the Act * * * " *Luker v. Ingalls Shipbuilding*, ____BRBS____, BRB No. 75-243 (March 19, 1976). See also, *Multy v. Halter Marine Fabricators, Inc.*, 1 BRBS 437, 440-441, BRB No. 74-179 (May 2, 1975). Claimant accordingly as a worker engaged in shipbuilding is an "employee" as that term is used in the Act.

The circumstances emphasized by the Employer in its brief (Emp. Br. pp. 1-2, 4-5, 15-16) that the Employer did not construct the entire ship or arrange for its launching at the site of the Plant does not control this case. It is the character of the employee's work, "his actual duties"

(*South Chicago Co. v. Bassett*, 309 U.S. 251, 260 (1940)) which are dispositive as to whether he is a covered "employee" and not the distribution of responsibility for building or launching the ship by the contracting corporations.

Claimant, under the union agreement with the Employer, is not classified or paid as a shipbuilder (Tr. 46-47; Res. Ex. 5-6). While this is important (see *Pillston Stevedoring Corp. v. Dellaventura*, (decided on July 1, 1976, No. 76-4042, United States Court of Appeals for the Second Circuit) slip opinion p. 4712) it is not regarded as overcoming the other facts of record showing that Claimant was working as a shipbuilder as that term is used in the Act at the time of his injury.

The Employer contends (Emp. Br. pp. 6, 13-14) that Claimant is no more of a shipbuilder than countless other workers who manufacture the assorted items used in the construction of ships. But, it is not novel or unusual for the interpretation of statutory terms of general import to involve distinctions of degree. "Here, indeed, as so often in other branches of the law, the decisive distinctions are those of degree and not of kind." *Welch v. Helvering*, 290 U.S. 111, 114-115 (1933). The resolution of such a matter will " * * * depend upon the nature and circumstances of the particular employment. 'No exact formulas can be laid down which will automatically solve every case.' " *Voehl v. Indemnity Ins., Co.*, 288 U.S. 162, 169 (1933).

"Hypothetical situations are laid before us, and the argument is pressed that the definition will breed absurdity if applied to this one of them or that. We refuse to be led away from the limitations of the concrete case. * * *

In every case the totality of facts is to be considered and appraised" *First National Bank v. Beach,* 301 U.S. 435, 438-439 (1937). Factually, Claimant's work in the instant case involved the construction of custom built units and this is in sharp contrast to the work of an employee who builds items of a standardized nature which can be readily used in homes, office buildings or machines as well as in ships. The Claimant's work may also be distinguishable from that of building items which are only incidental to the construction of a ship. Claimant's job pertains to the construction of a unit which is a fundamental and integral portion of a specific ship.

The Employer relies (Emp. Br. p. 10) upon an article by E. D. Vickery in the January 1974 issue of *Insurance Counsel Journal* in contending that "only those shipyard employees directly engaged in the physical construction * * * of a vessel" at the launch site are shipbuilders. Mr. Vickery sets forth no reasoning or analysis in the article in support of the construction of this part of the Act *id.* p. 68. Mr. Vickery submitted information to Congress prior to the 1972 amendments to the Act (*Hearings before the Subcommittee on Labor of the Committee on Labor and Public Welfare, United States Senate,* 92d, Cong. 2d Sess. May 2, 10, 17, 24 and June 5, 1972, pp. 293-350). It does not appear that Congress considered or intended to adopt a narrow interpretation of the coverage of the Act. By the express terms of the 1972 amendments Congress extended the reach of the Act to include any shipbuilder upon any dry dock, building way, marine railway, and also any shipbuilder on any area adjoining navigable waters customarily used in building a vessel. The controlling criteria is the type of activity performed in the designated areas. To restrict coverage to ship-

builders only while they worked on, or directly near, a ship under construction on a launch way or on navigable waters as the Employer contends (Emp. Br. 9-10) would read into the Act words of limitation which are not there and cannot be reasonably interpolated.

The finding and conclusion herein that Claimant is a covered employee is a reasonable and permissible interpretation consistent with the remedial character of this Act. Remedial legislation is to be given a liberal construction and a hospitable scope, *Tcherepnin v. Knight,* 389 U.S. 332, 336 (1967); *B. N. P. Steamboat Co. v. Norton,* 284 U.S. 408, 414-15 (1932).

Claimant was employed by an "employer" as that term is used in the Act. In Section 2(4) of the Act, 33 U.S.C. 902(4) an "employer" is defined as:

> * * * an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel).

It is undisputed (Emp. Br. p. 5) in this case that the Employer has employees engaged in maritime employment in whole or in part. The record shows that workers are employed in loading and unloading barges and that during these activities they are considered longshoremen and are regarded as covered under the Act (Tr. 52-53, 64-65).

As a separate and alternative ground the Employer, as discussed more fully *infra* p. 11, is also within the scope of the definition in the Act because of the employees

employed in shipbuilding in an area adjoining navigable waters customarily used in building a vessel.

Claimant was injured in an area customarily used by the Employer in building a vessel. Section 3(a) of the Act, 33 U.S.C. 903(a), provides:

> Compensation shall be payable under this Act in respect of disability or death of an employee but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel).

As found and concluded, *supra* p. 7, Claimant was engaged in building a fundamental part of a ship when he was injured. His place of work and the site of the accident was within the Plant's Structural Shop building and "approximately 300 feet East of the nearest navigable waterway [and] 1,000 feet West of the barge loadout area where the completed modules are loaded for shipment * * *" (Res. Ex. 10 p. 3).

The place where Claimant was injured is the place where the employer customarily engages in the building of portions of ships (Tr. 90-91). Work on contracts which involve ships and contracts which involve other construction, *viz,* buildings, bridges, refinery equipment, *etc.,* are conducted simultaneously (Tr. 94). Such combined work "is done constantly all the time" in the Structural Shop building (Tr. 91). The history of the plant, summarized *supra* pp. 4-5, shows that the area involved was specifically designed to handle shipbuilding

activities. The location and arrangement of buildings, machinery, and work space were established and are now maintained to facilitate the construction of large projects including portions of ships (Tr. 43, 47-48; Res. Ex. 3 p. 2). The Employer has an expert management staff for shipbuilding purposes (Tr. 67, 69-70, 98-99, 112-113) and has established a continual training program for its work force (Tr. 128-129; Res. Ex. 8). The business experience of the Employer extends not only to building portions of the particular large oil tanker involved in this case, but also to building parts of other large vessels at the Plant (Tr. 90-91; 104-105).

As explained at the hearing, the proximity of navigable waters for the shipment of modules by barges was essential to the Employer's business, there being no other reasonable way to transport these large steel products (Tr. 118). The locality of the area involved is much more than merely incidental to navigable waters.

The coexistence of expert management staff, trained work force, plant facilities and business experience in the particular location all show that the area where Claimant was injured was customarily used by the Employer in building vessels.

It is found and concluded that the Claimant, the Employer, and the place of the injury are all within the definitions used in the Act, and are within the coverage of the Act.

2. Claimant has been, since August 8, 1974, and continues to be, temporarily totally disabled.

After the accident on August 8, 1974, Claimant, as noted *supra* p. 3 continued to experience low back and

leg pain and August 21, 1974, was the last day he worked. For a period of time immediately after the accident he sought treatment from a number of doctors.

The record contains reports from two of the doctors, James P. Cloud, orthopedic surgeon, and Jerome W. Ambrister, orthopedic surgeon, who examined Claimant between August 8, 1974, and January 19, 1975. It was Dr. Armbrister's view after examining Claimant on October 7, 1974, that "Objectively, he has recovered from whatever injury he may have incurred, and is thought physically able to return to any type of work. He has no resulting disability from this injury." (Cl. Ex. 10 p. 2). Dr. Cloud states in his reports that he examined and treated Claimant on three occasions. He states that he expects Claimant to make a full recovery and sustain no permanent incapacity or disability from the August 8, 1974 injury (Cl. Ex. 11).

On November 1, 1974, Claimant was examined by Charles R. Neblett, a neurological surgeon. In Dr. Neblett's view Claimant had on that date a chronic lumbosacral sprain of moderate degree (Cl. Ex. 1, p. 1). He treated Claimant with heat and medicine (Cl. Ex. 1, p. 2). Claimant continued to visit Dr. Neblett complaining of persistent back and leg pain (Cl. Exs. 3 & 4), and on January 19, 1975, he was admitted to the Methodist Hospital in Houston, Texas (Tr. 20; Cl. Ex. 4). A myelogram test demonstrated a small bony canal as well as an extradural defect at the L5-S1 level. Dr. Neblett in a report dated February 18, 1976 states (Cl. Ex. 4):

> On January 21, 1975, the patient underwent a decompressive lumbar laminectomy with a removal of

> the spine and lamina of L4 and L5. A herniated nucleus pulposus at the L5-S1 level was found and removed. The patient followed a reasonably uncomplicated postoperative course with improvement in both the back and leg pain. * * * He was discharged on February 1, 1975, to be followed on an outpatient basis.

After his operation and a two-week stay in the hospital with steadily increasing signs of improvement in his condition, Claimant regularly visited Dr. Neblett for examination and treatment (Cl. Exs. 5 & 7). On December 12, 1975, Dr. Neblett reported (Cl. Ex. 7):

> Mr. Alford returned to the office today. He is 11 months postop lumbar laminectomy. The patient was changing a flat tire last week when he noted increasing low back pain with extension into both lower extremities more severe in the right leg. The pain was predominantly in the posterior aspect of the thigh but did not extend below the knees. He has continued with his medication and has improved somewhat although the discomfort and difficulties still remain. The neurological examination reveals a limitation of motion of the lumbosacral spine associated with tenderness and minimal spasm. Motor and sensory function in the lower extremities is felt to be essentially within normal limits. It is felt that the patient's neurologic status is reasonably stable and from a neurosurgical standpoint the patient should be considered a candidate for resumption of light working duties effective January 1, 1976.

Claimant presently continues to have some difficulty in moving around. He is able to work around his house, keep up his yard, drive his automobile and walk for

about ten or fifteen minutes without difficulty. A walk of a longer duration results in pain in his back, and he cannot climb stairs. He cannot bend over without having back and head pains and his right leg is subject to occasional numbness causing a loss of balance (Tr. 22, 32).

Claimant is twenty-eight years old. In school the ninth was the highest grade he completed. His work experience prior to his employment as a shipbuilding welder has been as a janitor in a school and in a hospital (Tr. 22-23).

Based upon the entire record, including my own evaluation of Claimant's appearance while testifying, I find and conclude that Claimant is disabled and is unable at this time to resume his employment as a welder, and there has been no showing that other suitable work is presently available for Claimant. I further find and conclude, that Claimant's disability is not permanent. The record shows that Claimant's condition has steadily improved. He may reasonably be expected to make a full recovery, and afterwards resume his employment as a shipbuilding welder.

In this case, accordingly, the circumstances warrant a compensation order directing benefits for temporary total disability from the date of the injury onward. *Salusky v. Army Air Force Exchange Service*, 3 BRBS 22, 24-25, BRB No. 75-192 (November 26, 1975); *Flaherty v. John T. Clark & Son of Boston Inc.*, 3 BRBS 159, 162, BRB No. 75-234 (January 15, 1976). I find and conclude, that Claimant is, and has been, entitled to compensation for temporary total disability as defined

in Section 8(b) of the Act, 33 U.S.C. 908(b), from August 9, 1974, through the date of this Decision and Order and during the continuance of such temporary total disability.

3. The Employer is responsible for payment of a reasonable attorney fee for legal services on behalf of Claimant.

Counsel for the Claimant, S. Bennett Sharber, Esq., has submitted an application for an attorney's fee claiming a fee for a total of 47-1/4 specified hours. Section 702.132 of the Regulations, 20 CFR 702.132, provides: "Any fee approved shall be reasonably commensurate with the actual necessary work performed, and shall take into account the capacity in which the representative has appeared, the amount of benefits involved and the financial circumstances of the claimant." Considering this regulation and the relevant provisions of Section 28 of the Act, 33 U.S.C. 928, it is found and concluded that an attorney fee in the amount of $2,500.00 would be reasonable in this case.

The Employer objects to the grant of any attorney fee on the ground that no evidence was submitted at the hearing to support such a grant. Provision, consistent with Section 702.132 of the Regulations, was made at the hearing for Claimant's attorney to submit an application for attorney fee (Tr. 135). The Employer had ample time to object to the specifications contained in the application. Under Section 702.338 of the Regulations, 20 CFR 702.338, the Law Judge has discretion as to the conduct of the proceeding, providing the parties have a reasonable opportunity for a fair hearing. No

unfairness is apparent and the Employer's objections to the consideration and approval of the application are rejected.

Liability for Interest, Penalties and Medical Costs.

Claimant is entitled to interest at the rate of 6 percent per annum on unpaid installments of past due compensation computed from the date each installment was originally due, *Strachan Shipping Company v. Wedemeyer,* 452 F.2d 1225, 1229-1230 (5th Cir. 1971), *cert. denied,* 406 U.S. 958 (1972); *Ryan v. McKie Company,* 1 BRBS 221, 230, BRB No. 74-160 (December 10, 1974).

The record shows that Employer received prompt notice of the injury on August 8, 1974. No compensation was paid (Tr. 21, 25) and there is no showing that the Employer filed a notice of controversion. An assessment, mandatory under the Act, is hereby imposed pursuant to Section 14(e) of the Act, 33 U.S.C. 914(e), in an additional amount equal to 10 percent of each unpaid installment, *Ryan v. McKie Company,* 1 BRBS 221, 231, BRB No. 74-160 (December 10, 1974); McCabe v. Ball Builders, Inc., 1 BRBS 290, 295-296, BRB No. 74-181 (January 31, 1975).

Based upon the foregoing Findings of Fact and Conclusions of Law, I make the following:

Compensation Order

1. The Employer shall pay to the Claimant compensation for temporary total disability at the rate of $102.00 per week from August 9, 1974, to the date of this Order, and shall continue to pay such compensation in bi-weekly

installments during the continuance of such disability, subject to the pertinent provisions of the Act.

2. An additional amount equal to 10 percent of each unpaid installment to the date of this Order shall be paid.

3. Interest shall be paid on accrued benefits at the rate of 6 percent per annum, computed from the date each payment was originally due until paid.

4. All amounts as are now due, shall be paid to the Claimant in a lump sum.

5. The Employer shall pay for, or reimburse, the Claimant for the reasonable cost of such necessary medical care and treatment as the nature of Claimant's injury has required, or may require, subject to the provisions of Section 7 of the Act, 33 U.S.C. 907.

6. The Employer shall pay directly to S. Bennett Sharber, Esq., the lump sum of $2,500.00 for legal services rendered to the Claimant.

/s/ ROBERT E. DUNCAN
Robert E. Duncan
Administrative Law Judge

Dated: September 13, 1976
Washington, D.C.

APPENDIX C-2

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CASE NO. 77-LHCA-568

OWCP NO. 33991

In the Matter of

ANTHONY R. BULLER
Claimant

v.

AMERICAN BRIDGE DIVISION,
UNITED STATES STEEL CORPORATION
Employer

August 26, 1977

SUPPLEMENTAL ORDER

On August 16, 1977, a Decision and Order was entered in the above-styled case. It has been noted in the Order in numerical paragraph one there was an award as to compensation for the period from December 3, 1976 to April 16, 1976. This should read from December 3, 1976 to April 16, 1977.

It is therefore ordered that the award should be to April 16, 1977, and not April 16, 1976. The said Order and Decision should stand in all other respects.

/s/ VERNON C. FIELD
Vernon C. Field
Administrative Law Judge

Dated: August 26, 1977
San Francisco, California

C-23

U.S. DEPARTMENT OF LABOR
Office of Administrative Law Judges
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

211 Main Street, Suite 528
San Francisco, California 94105

(202) 653-5092
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CASE NO. 77-LHCA-568

OWCP NO. 33991

In the Matter of

ANTHONY R. BULLER
Claimant

v.

AMERICAN BRIDGE DIVISION,
UNITED STATES STEEL CORPORATION
Employer

August 16, 1977

Martin W. Dies, III, Esquire
Stephenson, Thompson and Dies
712 Division Street
Orange, Texas 77630
For the Claimant

Kyle Wheelus, Jr., Esquire
Weller, Wheelus and Green
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Beaumont Savings Building
Beaumont, Texas 77701
For the Employer

Before: VERNON C. FIELD
Administrative Law Judge

DECISION AND ORDER

This is a claim for workmen's compensation benefits under the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C.A. § 901, *et seq.*), herein referred to as the "Act."

The principal unresolved issues in controversy are: Whether or not the Claimant herein is entitled to benefits under the Longshoremen's and Harbor Workers' Compensation Act and whether his injury is covered under such Act; nature and extent of his disability; and whether or not the claim was timely controverted.

Findings of Fact and Conclusions of Law

1. On June 29, 1976, the Claimant sustained an accidental injury arising out of and in the course of his employment with the Respondent-Employer when a certain T-Bar dislodged and fell against, and upon the right lower leg of the Claimant. At the time of his injury the Claimant's average weekly wage was $212.37.

2. At the time of his injury the Claimant was employed as a fitter in a steel fabricating plant of the Respondent-Employer.

For an individual to be afforded coverage under the Act, pertinent factors must be established as to the Employer, as to the Employee, and as to the location where the accidental injury occurred.

In this particular case there is no dispute as to the Employer, that is, that American Bridge Division of

United States Steel is an Employer as defined in section 2(4) of the Act. However, there exists a serious dispute as to the other two factors. As to these other two factors, it has many times been said that the Employee must meet the "status" test and the place of injury must meet the "situs" test and such terminology shall be used herein, although the Act does not use this phraseology.

In making the necessary determinations as to "status" and "situs" one must consider the exact nature of the employment of this Claimant at the time of his injury and the exact place of his injury. For the Claimant to be entitled to coverage and therefore the benefits under the Act, facts must establish that both the "status" and "situs" tests have been met.

The American Bridge Division of United States Steel Corporation is a Steel Fabricating Company engaged in the industry of supplying various types of steel fabricated structures to their customers. These structures consist of various types used in construction of bridges, buildings, pressure vessels, power shovels and machinery, and other like large steel structures or components. The plant of the company is located at Orange, Texas. On June 29, 1976, and for several years prior thereto, they were not engaged in the complete construction and assembly of seagoing vessels, although years ago they did engage in such a business.

Newport News Shipbuilding Company is a company located at Newport News, Virginia, and this company is engaged in the complete construction and assembly of seagoing vessels in Virginia. Although Newport News Shipbuilding Company does have the capability of the complete construction of a vessel, they chose to contract

out the construction of certain modules, sometimes referred to as Coffer Dams, Bulkheads, or Walls, to the American Bridge Division of the United States Steel Employer herein. Each module was a material and integral part of the ship that was being constructed. Newport News would furnish blueprints and materials as to these modules to the American Bridge Division as per their contract. American Bridge Division would then construct these large steel modules and upon completion Newport News would inspect them, and if accepted American Bridge Division would load them onto barges owned by Newport News or under their control at the wharf or dock of the American Bridge Division. By barge, Newport News would then transport them out of the Sabine River into the Gulf of Mexico, around Florida, and up the east coast to the Newport facility for assembly into the seagoing vessel that was being built and assembled by Newport. The business relationship by, and between Newport News Shipbuilding Company and American Bridge Division of United States Steel was that of prime contractor and subcontractor.

On June 29, 1976, the Claimant, Anthony R. Buller, was in the employment of American Bridge Division of United States Steel. The company contends he was employed as a helper classified as a steel fabricator. The Claimant contended he was classified as a fitter. Regardless of the particular name or classification of his job, he performed the duties of a fitter. In performing his job he was required to fit certain pieces of steel on the other pieces of steel in acordance with the blueprints, these pieces of steel then later being welded, and by welding all of the steel components together the finished product would be produced. Most of all his working

time he was engaged in doing this type of work. During the month of June 1976, and for some time prior thereto, he was doing this type of work for this Employer. On some occasions he would be working on the modules for the ship being built by Newport and on other occasions he would be working on other job orders not connected with the modules. The work that he actually performed and the job orders that he worked on was in accordance with the instructions of his Employer.

On June 29, 1976, he was performing his regular duties connected with the fabricating of the ship modules. He was fitting large, specially designed T-bars onto steel plates. In the necessary movement of these large T-Bars one of them slipped and fell catching the Claimant on the right leg causing a fracture to the leg.

As indicated before, this Claimant must meet the "status" test for him to be covered under the Act. Section 2(3) provides as follows:

> The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and ship-breaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

Therefore, for the Claimant to be covered as an employee he must be a shipbuilder. At the time of the injury the Claimant was performing necessary work in the construction of this large steel module which was being built exclusively for a particular ship. This was an integral

part of the ship that was being constructed. He, therefore, was a shipbuilder the same as any one else who might be building any part of a ship. If the Claimant was performing the same work for Newport News Shipbuilding Company, the question would not even arise as to whether the Claimant was a shipbuilder. The fact that he was working for a different company does not change the nature of his work or the duties that he was performing.

The fact that this employee did on many occasions work on other job orders, which could not be considered and were not shipbuilding, does not alter the fact that at the time of his injury he was participating in the building of a ship. His "status" would change from time to time and on some jobs he would not have been afforded the protection of the Longshoremen's and Harbor Workers' Compensation Act. However, at the time of his injury he does meet the "status" test.

The Employer contends that this Claimant is not covered by reason of the fact that the American Bridge Division is not a shipbuilder per se but is a steel fabricating company. There are no provisions in the Act that requires the Employer to meet a "status" test and, even so, a portion of the business being conducted by this concern was that of building an integral part of a ship. (*Nulty v. Ayers Steamship Company*, 539 F.2d 533 (1976)).

As to the "situs" test, section 3(a) of the Act provides:

> Compensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United

> States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel).
> . . .

The applicable portion of the Act in this case is that portion which states: Injury occurring upon navigable waters or other adjoining area customarily used by an Employer building a vessel. It is clear from the evidence and it has been conceded that the plant of the American Bridge Division has on three sides the Sabine River, which is conceded to be a navigable waterway used in maritime shipping.

The central shop of the Employer where the Claimant was injured is within the plant and is very close to where the dock and wharf are located from which the finished modules on which he worked were loaded onto barges. There is no question but that this Employer, at least a good portion of the time in June of 1976, was using this area for building an integral and necessary portion of a vessel. For the same reasons as set out as to the "status" test the building of an integral portion of a ship should be considered the same as the building and assembly of the entire vessel. Therefore, in this case the "situs" test is met.

The Employer/Respondent contends that this section should be interpreted to mean "the area where the finished vessel was being constructed, completed and assembled," this location being in Virginia, several hundred miles away from where the injury occurred.

Such an interpretation would be a very restrictive interpretation of the Act. This I cannot do. The language

of the Amendments is broad and suggests that we should take an expansive view of the extended coverage. Indeed, such a construction is appropriate for this Remedial Legislation. The Act "must be liberally construed in conformance with its purpose and in a way which avoids harsh and incongruous results." *Voris v. Eikel,* 346 U.S. 328, 333 (1953); *North Eastern Marine Terminal Co., Inc., et al. v. Caputo,* U.S. S.Ct. Nos. 76-444 and 76-454 (June 1977).

Although the Employer herein, a subcontractor, has secured payment, some consideration should be given to the provisions of section 4(a) (33 U.S.C. § 904) which provides as follows:

> Every Employer shall be liable for and shall secure the payment to his Employees of the compensation payable under sections 7, 8 and 9. In the case of an Employer who is a subcontractor, the contractor shall be liable for and shall secure the payment of such compensation to the Employees of the subcontractor unless the subcontractor has secured such payment.

It is clear that the intent of this section is not to permit or allow a prime contractor, whose employees would be covered under the Act, to avoid the Employer responsibilities and contingent liabilities under the Act by subcontracting the work to be performed to others. In this case it would appear that if the Employer herein had not secured payment under the Act, this Claimant could go against the prime contractor, Newport News Shipbuilding Company, since he is entitled to be paid monetary benefits under the Act.

3. As a result of the said accident the Claimant sustained an injury to his right leg resulting in his temporary total disability from June 29, 1976 to October 25, 1976, and also from December 3, 1976 to April 16, 1977, and said injury resulting at a ten percent permanent Partial loss of the use of his right leg entitling the Claimant to compensation for 28 and eight-tenths weeks.

Facts reveal that after the Claimant recovered from the injury of June 29, 1976, he returned to work for this Employer. However, on December 3, 1976, he slipped and fell and re-injured the right leg. This injury on December 3, 1976, did not arise out of and was not in the course of the employment; however, evidence is clear that this injury was a refracture of the right leg at the same place of the original fracture. It must be concluded then that this injury of December 3, 1976, was causally related to the original injury to this leg on June 29, 1976, by reason of the weakness in the leg caused by that injury and therefore is compensable. It is for this reason that the Claimant is entitled to a temporary total compensation for temporary total disability from December 3, 1976 to April 16, 1977, at which time the temporary total disability ceased.

4. Notice of Controversion was not timely filed by the Respondent in accordance with section 14(d) of the Act. Evidence reflects that the Claimant suffered his injury on June 29, 1976, and written Notice of Controversion is dated by the Employer November 15, 1976.

5. In consideration of the nature and extent of the legal services rendered to the Claimant by his attorney in connection with this case which have extended over a period of several months and in consideration of the

amount of compensation which he has been able to obtain for the Claimant, and in further consideration of the Respondent's comments concerning such proposed fee, a legal fee (including costs) in the amount of $750.00 is deemed fair and reasonable and in accordance with the criteria provided in the Act and Regulations, 20 C.F.R. § 702.132, and is approved.

6. Evidence reflects that the Claimant was required to pay $40.00 medical expenses out of his own pocket by reason of the injury sustained herein, and the Claimant should be reimbursed this $40.00. The record also reflects that some insurance company under some policy has paid additional medical expenses in connection with the injury sustained herein, and if such company should ever make demand for reimbursement for such medical expenses, such reimbursement should be made by the Respondent-Employer herein and not by the Claimant.

ORDER

It is therefore ordered that:

1. The Respondent shall pay to the Claimant compensation for temporary total disability for the period from June 29, 1976 to October 25, 1976, and for the period from December 3, 1976 to April 16, 1976, at the rate of $141.58 per week (two-thirds of the Claimant's average weekly wage at the time of his injury). And in addition thereto shall pay to the Claimant compensation at the same rate for 28 and eight-tenths weeks.

2. The Respondent shall take credit for any compensation which may have previously been paid to the Claimant on account of his disability due to his injury of June 29, 1976, and the Respondent shall further pay to the Claim-

ant interest on the balance of compensation which is owed to him pursuant to this Order at the rate of six percent per annum computed from the date that such payment was originally due until the date of actual payment. The Respondent shall pay to the Claimant an additional ten percent as penalty in accordance with the provisions of section 14(e).

3. The Respondent shall further pay to the Claimant's attorney, Martin W. Dies, Esquire, the sum of $750.00 for his legal fees and costs in connection with this case, which sum shall be paid in addition to the compensation awarded to the Claimant.

4. The Respondent shall further pay to the Claimant the sum of $40.00 as reimbursement for medical expenses and any and all medical expenses past and future connected with or related to the injury sustained herein.

/s/ VERNON C. FIELD
Vernon C. Field
Administrative Law Judge

Dated: August 16, 1977
San Francisco, California

APPENDIX C-3

U.S. DEPARTMENT OF LABOR
Office of Administrative Law Judges
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

Case No. 76-LHCA-884

OWCP No. 8-27557

In the Matter of

HECTOR CANTU, SR.
Claimant

v.

AMERICAN BRIDGE DIVISION
OF U. S. STEEL CORPORATION
Employer

SELF-INSURED

June 14, 1977

Digest Section 1806

Syllabus

A maintenance welder for a manufacturer of pipelines, furnaces, steam shovels, and other items requiring steel plate, but not of ships, who was injured while attempting to move a metal navigational sign which was to be placed aboard a barge loaded with modular ship components was not a maritime employee within Longshoremen's Act Section 2(3), since he had hardly any involvement with shipbuilding. Claimant had previously worked on fabrication of modular ship sections and repairing of barge covers, but that work was isolated, incidental, and distant in time.

p. 135 (ALJ)

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Port Arthur, Texas
For the Claimant

Kyle Wheelus, Jr., Esquire
Wheelus, Wheelus & Green
Beaumont Building
Beaumont, Texas
For the Employer
and Carrier

Before: JULIUS A. JOHNSON
Administrative Law Judge

DECISION AND ORDER

In this claim for permanent and total disability compensation under the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, *et seq.* (hereinafter, the "Act"), the primary issue relates to jurisdiction.

Findings of Fact and Conclusions of Law

Respondent is the American Bridge Division of the United States Steel Corporation in Orange, Texas with its plant, covering about 86 acres, on a peninsula of the Sabine River. It is principally engaged in the business of structural and plate steel construction and fabrication. Among other things, it manufactures large pipe lines for the transshipment of gas and oil; it fabricates structural steel components for bridges, buildings, power plants, electric furnaces, steam shovels (for strip coal mining) and tanks and pressure vessels for use in the petroleum

and chemical industries. It is reportedly one of the largest such businesses in the world, if not the largest.

In earlier years ships and other water vessels were built and launched at respondent's facility but these activities have been discontinued since 1965. The marine ways, while still present, have not been used in the present enterprise, with its modernized facilities, and have fallen into disrepair. Respondent's facilities consist of numerous shops, including a heavy plate shop, a structural shop, a pipe mill, a paint and shipping shop, and a machine shop, located about 300 feet from the navigable Sabine River.

As a maintenance welder in the machine shop, claimant performed various welding chores, relating principally to the maintenance and repair of machines and equipment in the plant. He also performed corrective welding. He has handled welding assignments on expansion-contraction rockers for highway bridges, on flood gates for dams and on the machine work for electric furnaces, buildings and structures of various types. He is not a production worker but he is the only welder in the machine shop. Based on his own testimony, claimant does not generally perform any work which could be described as shipbuilding or ship repairing. However, he did repair some covers on a barge several years ago. Also, about six months before the injury here, he performed some weekend work in the heavy plate shop on a section of a barge being constructed for the Sea Train Corporation.

Claimant injured himself on March 4, 1975 when he fell from a table in the machine shop while attempting to move a metal navigational sign, weighing about 75 pounds, which he had made by welding several pieces

together. The sign, a metal pipe approximately six feet high with four triangular, pre-cut metal plates set at the top so as to display a thirty-three square inch diamond shape (Joint Exh. 1), was to be painted black and placed on the highest point of modular sections stacked on a barge at the dock for towing to a shipbuilder in Newport News, Virginia. The sign, the first to ever be made by claimant, was necessary to comply with a rule relating to the navigation of vessels:

> Between sunrise and sunset a vessel being towed, if the length of the tow exceeds 600 feet, shall carry where it can best be seen a black diamond shape at least 2 feet in diameter. Rule 5(d), Article 5, *Rules of the Road, International-Inland, United States Coast Guard* (1972). (Respondent's Exh. 3)

The need for the sign arose in an incidental way. Under its contract with two shipbuilders, the Newport News Shipbuilding Company in Virginia and the Sea Train Corporation in New York, respondent constructed modular sections for tankers in its heavy plate shop and structural shop. The sections are loaded by respondent's employees on barges provided by the shipbuilders with the bottom section welded to the barge and the other levels, separated by timber, welded together by pipe to stay in place. The sign, such as claimant made, is welded on the top level. (Respondent's Exh. 4) The shipbuiders have the barge, or barges, towed by tugboat to their shipyards where the modules are unloaded. Stern and bow sections, built or provided by the shipbuilders, are added to the modules, which represent the middle portion, in the assembly process of the shipbuilders and launched in their shipyards as tankers. Empty barges are returned

to respondent's facility for additional loads—sometimes with, and sometimes without, the black diamond sign.

In the instant case, a sign was needed for a bargeload of modular sections for the Newport News company and a representative gave a diagram (Claimant's Exh. 1) for its construction to respondent's shipping superintendent. Claimant fabricated the sign before his injury. It was painted and set atop the load to be towed to Newport News.

Claimant asserts coverage under the Act for his injury.

Inasmuch as respondent does not contest here its being an "employer" within the meaning of the Act, since it does have some maritime employees (Br. 3), jurisdiction turns on whether claimant satisfies both the requirements of *status*, as one engaged in maritime employment under § 902(3), and *situs*, with regard to the occurrence of the injury upon "navigable waters" as the term is defined under § 903(a). On the evidence here, it must be determined that he does not.

Claimant must occupy the status of an "employee", defined under the Act as:

> [A]ny person engaged in maritime employment including any longshoreman or other person engaged in longshoring operations, and any harbor worker, *including a ship repairman, shipbuilder,* and shipbreaker. . . . (Emphasis added)

While it is contended that claimant was involved in shipbuilding or repairing, it is clear from his actual work that he had hardly any involvement in these functions. His principal duty as a maintenance welder in the ma-

chine shop was to perform the necessary welding work for the proper maintenance and repair of machines and equipment used in respondent's facilities. Generally, he did not build or repair parts for ships. Thus, the essential nature of claimant's work would not establish status as a maritime employee and his work cannot be deemed a necessary and integral part of a process cognizable under the Act. *See, e.g., Mildenberger v. Cargill, Inc.*, 2 BRBS 51 (1975). This record does not show that any machines or equipment that claimant might have routinely worked on were essentially involved in ship building or repair, to be sure, not respondent's admitted business. See *Kininess v. Dry Dock and Shipbuilding Co.*, 4 BRBS 13 (1976)) Although claimant indicated he had worked on some previous occasions in making modular sections and repairing barge covers, it is clear such work was not only removed in point of time from the more current assignments at the time of injury but it was quite isolated and incidental.

More importantly, at the time of the injury claimant was not involved in ship building or repair. He was quite simply involved in fabricating, as respondent correctly states it, a "metal signal flag". It was neither an integral part of the modular sections respondent had constructed and loaded on the barge nor was it an integral part of the barge itself. It was merely to be a traffic sign to other users of the waterway that a vessel was being pulled on a towline exceeding 600 feet, consistent with the "rules of the road". Thus, claimant's work at the specific time of injury bore not even a tenuous connection to shop building or repair. See *Jacksonville Shipyards Inc. v. Perdue*, 539 F.2d 533 (5th Cir. 1976).

As to situs, it will suffice to state that claimant's work area in the machine shop, approximately 300 feet from the navigable Sabine River, must be an area customarily used by respondent in repairing or building a vessel, and no evidence here shows that it was. Such ship building or repair work that respondent may be assumed to have performed did not take place in the machine shop.* The machine shop was customarily used to perform maintenance and repair work on machines and equipment and for making non-marine parts.

Under the circumstances, the claim must be denied for lack of jurisdiction under the Act.

ORDER

The claim is hereby denied for lack of jurisdiction.

/s/ JULIUS A. JOHNSON
Julius A. Johnson
Administrative Law Judge

Dated: June 14, 1977
Washington, D.C.

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* This case is clearly distinguishable from *Alford v. American Bridge Division, U.S. Steel Corp.*, 76-LHCA-293 (1976), which is relied upon by claimant, because there the claimant was injured while working in respondent's structural shop on a part of a module for a tanker.

Appendix

Office - Supreme Court, U.S.
FILED
NOV 9 1981
ALEXANDER L. STEVAS,
CLERK

NO. 81-811

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

AMERICAN BRIDGE DIVISION,
UNITED STATES STEEL CORPORATION,
Petitioner

v.

JOHN K. ALFORD, ANTHONY R. BULLER,
HECTOR CANTU AND DIRECTOR, OFFICE OF
WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR,
Respondents

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Of Counsel:
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CERTIFICATE OF CORPORATE AFFILIATES OF UNITED STATES STEEL CORPORATION

United States Steel Corporation has no parent company. The following are affiliates or subsidiaries in which United States Steel Corporation owns less than 100%:

Name of Company	State or Sovereign Power of Incorporation
Athlone Prospecting & Development Corporation, Ltd.	Irish Republic
Companhia Meridional de Mineracao	Brazil
Brazaco-Mapri Industrias Metalurgicas S.A.	Brazil
Merinds Mineracao	Brazil
Mineracao Carajas, Ltda.	Brazil
Mineracao Maraba, Ltda.	Brazil
Mineracao Xingu, Ltda.	Brazil
Torremco-Sociedada de Navegacao E Comercio, Ltda.	Brazil
FHS Stahlverformung GmbH	West Germany
FHS Automotive Parts Manufacturing Ltd.	Wales, Gr. Britain
Industria de Tubos y Perfiles, S.A. (Intupersa)	Guatemala
Mecania Walsywa, Ltda.	Brazil
Titansa (Proprietary), Limited	South Africa
Triangeler Daemmsloffwerk GmbH (Triangel GmbH)	West Germany
USS MaxTech Company, Inc.	Delaware
USS MaxTech Company, Ltd.	Liberia
Terninoss Acciai Inossidabili-S.p.A.	Italy
USS Technology (Japan), Ltd.	Japan
Altos Hornos de Vizcaya, S.A. (AHV)	Spain
Associated Manganese Mines of South Africa, Ltd.	South Africa
Associated Ore & Metal Corporation, Ltd.	South Africa
Africa Mining & Trust Company, Ltd	South Africa
Avsteel SWA, Ltd.	South Africa

Name of Company	State or Sovereign Power of Incorporation
Blue Grass Phosphate Company	Maine
West Africa Bulk Shipping	Liberia
Compagnie Miniere de l'Ogooue (Comilog) Companies owned by Comilog	Gabon
Comireg S.A.	France
Sacinter	Switzerland
Sofemi S.A.	France
Deepsea Ventures, Inc.	Delaware
Feralloys, Ltd.	South Africa
Kappa Mining & Prospecting Co., Ltd.	South Africa
La Pointe Iron Company	Wisconsin
Minerales Ordaz C.A.	Venezuela
Naviteck Company	Liberia
Northern Tier Pipeline Co.	Delaware
Oresteel Investments (Proprietary), Ltd.	South Africa
P.T. Pacific Nikkel Indonesia	Indonesia
Prieska Copper Mines (Pty.) Ltd.	South Africa
Sigma Mining & Prospecting Co. (Pty.), Ltd.	South Africa
Structural Dynamics Research Corporation	Ohio
Termerid Mineracao, SA	Brazil
Theta Mining & Prospecting Company (Pty.), Ltd.	Botswana
Tilden Iron Mining Company	West Virginia
West Union Canal Company, The	Utah
Zeerust Chrome Mines, Limited	South Africa
Inyala Chrome Company (Private) Limited	Rhodesia
Zeta Mining & Prospecting Company (Pty.), Ltd.	Botswana
Zuari Agro Chemicals Ltd.	India
Zululand Titanium (Pty.), Ltd.	South Africa
Bartow Chemical Products	Florida

Name of Company	State or Sovereign Power of Incorporation
Century III Associates	Pennsylvania
Gardinier Joint Venture (Non- operating)	Florida
Lions Ridge at Vail	Colorado
Live Oak Uranium Operations	Texas
Mahoning Ore & Steel (Partnership)- (Formerly Mahoning Ore and Steel Company which was dissolved 1/1/79)	Minnesota
Ocean Mining Associates	Virginia
Pennzoil do Brazil, Ltd.	Texas
Rockland Joint Venture (Cost-Sharing)	Florida
RMI Company	Ohio
Ashco, Inc.	Ohio
Nati Gas Co.	Ohio
Tradco	Ohio
Timpco	Missouri
Wadsworth Parkway Associates, Ltd. (owned by Eighty-Eighth & Wadsworth Corporation)	Colorado
Adela Investment Company, S.A.	Luxembourg
Companhia Siderurgica Paulista "Cosipa"	Brazil
First National Bank (Albion, Pa.)	Pennsylvania
Penokee Iron Co.	Wisconsin
Rinker Materials Corporation	Florida
SIDBEC-Normines, Inc.	Quebec, Canada
Inspection Technology, Inc.	Delaware

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Attorneys for Petitioner
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United States Steel Corporation

CERTIFICATE OF SERVICE

This is to certify that three true and correct copies of the foregoing Supplemental Appendix to Petition for Writ of Certiorari of American Bridge Division, United States Steel Corporation, were sent by United States Mail, Return Receipt Requested, on November 6, 1981, to the following Counsel of Record:

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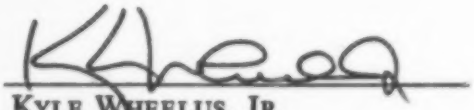
in compliance with Rules 28.3, 28.4 and 28.5 of the Rules of the Supreme Court of the United States. All parties required to be served by Rules 28.3 and 28.4 have been served.



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Opposition

Office - Supreme Court, U.S.
FILED
DEC 31 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-811

In the Supreme Court of the United States

OCTOBER TERM, 1981

AMERICAN BRIDGE DIVISION, UNITED STATES STEEL CORPORATION, PETITIONER

v.

JOHN K. ALFORD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether workers fabricating custom-built steel component parts for particular vessels are "shipbuilders" and therefore covered employees within the meaning of Section 2(3) of the Longshoremen's and Harbor Workers' Compensation Act.

2. Whether areas adjacent to actual navigable waters that are used to fabricate custom-built steel component parts for particular vessels and to maintain equipment used in such work are areas "customarily used by an employer in * * * building a vessel" within the meaning of Section 3(a) of the Act.

3. Whether a worker who, at the moment of injury, was building a navigational signal required by Coast Guard regulations for a barge, and who regularly maintained and repaired equipment used to fabricate component parts of particular vessels, is an employee engaged in "maritime employment" within the meaning of Section 2(3) of the Act.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statement 2

Argument 8

Conclusion 14

TABLE OF AUTHORITIES

Cases:

Alabama Dry Dock & Shipbuilding Corp. v. *Kininess*, 554 F. 2d 176, cert. denied, 434 U.S. 903 ..... 12, 13

Dravo Corp. v. *Maxin*, 545 F. 2d 374, cert. denied, 433 U.S. 908 ..... 9, 10, 12

Garvey Grain Co. v. *Director, Office of Workers' Compensation Programs*, 639 F. 2d 366 9

Hite v. *Maritime Overseas Corp.*, 375 F. Supp. 233 10

Howard v. *Rebel Well Service*, 632 F. 2d 1348 13

Jacksonville Shipyards, Inc. v. *Perdue*, 539 F. 2d 533, aff'd in part, 444 U.S. 69 12

Newport News Shipbuilding & Dry Dock Co. v. *Graham*, 573 F. 2d 167 ..... 9, 10, 13

Northeast Marine Terminal Co. v. *Caputo*, 432 U.S. 249 ..... 6, 7, 8, 9, 11, 12, 13

P.C. Pfeiffer Co. v. *Ford*, 444 U.S. 69 ..... 6, 8, 13

Page

Cases—Continued:

Texports Stevedore Co. v. *Winchester*, 632 F. 2d 504, cert. denied, No. 80-1549 (June 1, 1981) 10, 13

Warren Brothers v. *Nelson*, 635 F. 2d 552 9

Statutes:

Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. (& Supp. III) 901 *et seq.* 2

Section 2(3), 33 U.S.C. 902(3) 3, 8
Section 3(a), 33 U.S.C. 903(a) 3, 5, 7, 9, 10
Section 21(b)(3), 33 U.S.C. 921(b)(3) 4
Section 21(c), 33 U.S.C. 921(c) 6

In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-811

AMERICAN BRIDGE DIVISION, UNITED STATES STEEL CORPORATION, PETITIONER

v.

JOHN K. ALFORD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A20) is reported at 642 F. 2d 807. The modification of the opinion dated September 4, 1981 (Pet. App. A23-A29) is reported at 13 B.R.B.S. 837. A further modification (Pet. App. A30-A31) dated September 22, 1981 is not yet reported. The opinion of the Benefits Review Board in the Alford case (Pet. App. B1-B8) and in the Buller case (Pet. App. B9-B12) are reported at 7 B.R.B.S. 484 and 7 B.R.B.S. 481 respectively. The Board's opinion in the Cantu case (Pet. B13-B15) is unreported. The opinions of the administrative law judge (Pet. App. C1-C20, C21-C33, C34-C40) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. A21-A22), entered on April 15, 1981, was modified in part on

September 4, 1981 (Pet. App. A23-A29) and on September 22, 1981 (Pet. App. A30-A31). The petition for a writ of certiorari was filed on October 30, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Respondents John Alford, Anthony Buller and Hector Cantu were injured during the course of their employment with petitioner American Bridge Division, United States Steel Corporation, at its facility in Orange, Texas. The facility occupies 86 acres on a peninsula on the Sabine River. The plant was used as a complete shipyard during World War II, but petitioner has not launched a vessel there since 1965. The plant's primary function since 1965 has been to fabricate steel components of vessels and other large structures, including such things as bridges, steel buildings, and power plants. Shipbuilders contract with petitioner to provide custom-built components or "modules" made to contract specifications, which become part of particular vessels being assembled at the builders' shipyards. When petitioner completes the modules, weighing several tons each, its employees load them onto ocean going barges for transportation to the final assembly point (Pet. App. A5, A12, B14, C4, C6, C25-C26, C35-C36).

1. Respondent Alford was injured in August 1974 in petitioner's structural shop, when he struck his back on a steel beam while welding a subassembly for a module of an oil tanker being assembled at the Brooklyn, New York shipyard of the Sea Train Corporation (Pet. App. A5). At the time of Alford's injury, work on five contracts was underway in the structural shop—two for Sea Train and three for nonmaritime projects. The structural shop is located 300 feet east of the nearest water and 1,000 feet west of where the modules are loaded onto barges for shipment (*id.* at A6, C13).

Alford filed a claim and was awarded benefits under the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. (& Supp. III) 901 *et seq.* The administrative law judge held that Alford was a covered "employee," because he was a "shipbuilder" under Section 2(3) of the Act, 33 U.S.C. 902(3). The ALJ stressed that "[t]he custom-built modules Claimant was building when he was injured have no other purpose but to be incorporated in the specific oil tanker. * * * Take away the modules and the oil tanker would not be possible" (Pet. App. C9). He therefore rejected petitioner's argument that Alford could not be a shipbuilder because petitioner was not involved in constructing the entire ship, which would be launched at another site. "It is the character of the employee's work * * * which [is] dispositive * * * and not the distribution of responsibility for building or launching the ship by the contracting corporations" (*id.* at C9-C10). The ALJ also noted that the module Alford was fabricating was "a fundamental and integral portion of a specific ship" as distinguished from "items of a standardized nature which can be readily used in homes, office buildings or machines as well as in ships" or "which are only incidental to" ship construction (*id.* at C11).

The ALJ found that Alford was injured on "navigable waters" within the meaning of Section 3(a) of the Act, 33 U.S.C. 903(a).[1] The ALJ concluded that the structural shop was a covered situs because it was "where the employer customarily engages in the building of portions of ships" (Pet. App. C13). The shop's location next to actual navigable waters, furthermore, was not "merely incidental" (*id.* at C14). Rather, "the proximity of navigable waters for the shipment of modules by barges was essential to the

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[1]This "situs" provision defines navigable waters as including any "adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel" (33 U.S.C. 903(a)).

Employer's business, there being no other reasonable way to transport these large steel products" (*ibid.*).

Petitioner appealed to the Benefits Review Board pursuant to 33 U.S.C. 921(b)(3). The Board reversed the ALJ's decision that Alford was a covered shipbuilder and declined to reach the situs question. The Board reasoned that an employee must be engaged or directly involved in an "ongoing shipbuilding operation" (Pet. App. B6) to qualify as a "shipbuilder." The Board concluded that there was no ongoing shipbuilding operation at petitioner's facility, apparently because petitioner builds only parts of ships and does not assemble entire vessels (*id.* at B7-B8).

2. Respondent Buller was injured in June 1976 while working as a fitter for petitioner. His job required him to fit together pieces of steel that would then be welded together and fitted into the finished modules. During his three years of employment with petitioner, Buller had spent 95% of his time either working on component parts for vessels or repairing barges used by petitioner to ferry materials across the peninsula. On the day of his injury, he was fitting large, specifically designed T-bars onto steel plates when one of the T-bars fell and fractured his right leg. The module was being constructed pursuant to a contract with Newport News Shipbuilding & Dry Dock Company. Upon completion, the module was to be transported by barge to that company's Virginia shipyard for final assembly. The shop in which Buller worked was approximately 150 yards from the Sabine River (Pet. App. A6-A7).

The ALJ who heard Buller's claim found that the injury was compensable under the Act. He held that Buller was a covered "shipbuilder" because he was helping construct a module "being built exclusively for a particular ship. This was an integral part of the ship that was being constructed" (Pet. App. C27-C28). The ALJ noted that if Buller had been performing the same work directly for the Newport News

Shipbuilding Company, there would be no question as to his status as a shipbuilder. "The fact that he was working for a different company does not change the nature of his work or the duties that he was performing" (*id.* at C28). The ALJ also found that the injury occurred on a covered situs since Buller was injured at the central shop located very near the dock and wharf where the finished modules are loaded onto barges for shipment. "There is no question but that this Employer * * * was using this area for building an integral and necessary portion of a vessel" and thus fulfilled the situs requirement of Section 3(a) (*id.* at C29). The ALJ rejected petitioner's argument that Section 3(a) should be construed as requiring the injury to occur at the Virginia shipyard where the vessel was being assembled. The ALJ held that this "would be a very restrictive interpretation of the Act" that would be contrary to the legislation's remedial purposes (*id.* at C29-C30). The Benefits Review Board reversed the ALJ, relying on its earlier ruling in Alford's case regarding the definition of "shipbuilder" (*id.* at B11-B12).

3. Respondent Cantu was injured in March 1975 when he fell while moving a 75 pound "black diamond" navigational signal he was constructing. This metal flag was to be attached to the top of a barge bound for Newport News to comply with navigational rules of the Coast Guard (Pet. App. A7). The ALJ hearing Cantu's claim held that he was not entitled to benefits under the LHWCA. The ALJ reasoned that Cantu did not satisfy the status requirement of Section 3(a), because the navigational signal he was building when injured "was neither an integral part of the modular sections [petitioner] had constructed and loaded on the barge nor was it an integral part of the barge itself" (Pet. App. C39). The ALJ also ruled that there was no evidence that the machine shop where Cantu worked was an area customarily and regularly used for shipbuilding or repair work (*id.* at C40). On appeal, the Benefits Review Board

affirmed the ALJ's decision, reaching only the question of employee status and again relying on its earlier conclusion in Alford's case that there was no "ongoing shipbuilding operation" at petitioner's Orange, Texas plant (*id.* at B15).

4. Each of the three respondents filed petitions for review in the court of appeals under 33 U.S.C. 921(c). In a consolidated opinion, the court reversed the Benefits Review Board with respect to Alford and Buller and initially affirmed, and then reversed, the Board with respect to Cantu.[2]

In finding coverage for Alford and Buller, the court concluded that they qualified under the Act as "shipbuilders," a "general term" utilized by Congress "for application to diversified situations" (Pet. App. A9). Relying on several earlier Fifth Circuit decisions, as well as this Court's decisions in *P.C. Pfeiffer Co.* v. *Ford*, 444 U.S. 69 (1979), and *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249 (1977), the court ruled that an employee met the "maritime employment" status requirement if his work activities (1) had a significant relationship to traditional maritime activities or (2) were an integral part of an ongoing shipbuilding process (Pet. App. A10, A13). Because the modules Alford and Buller worked on were custom-built and "were not interchangeable with any other type of fabricated steel which the company manufactures," the court concluded that "module construction was clearly a fundamental, integral and *essential* step in the process of building vessels" (*id.* at A13-A14; emphasis in original).

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[2]The court originally concluded that Cantu was not involved in "maritime employment" because his work did not qualify as "traditional maritime activity or reach[] the level of involvement in the shipbuilding process described as *fundamental, integral* or *essential*" (Pet. App. A14; emphasis in original).

The court also found that the injuries occurred upon "navigable waters" as defined by the Act. Petitioner's location on the Sabine River was "not merely incidental but essential to American Bridge's business" (Pet. App. A15). The court held that "there is little doubt * * * that the fabrication shop where Alford and Buller worked [was] within the boundaries of 'adjoining areas customarily used by an employer in * * * building a vessel' " within the meaning of Section 3(a) (*ibid.*).

The court rejected petitioner's argument that, because no vessel was actually assembled at its facility, its plant could not qualify as an "area[] customarily used * * * in * * * building a vessel" (33 U.S.C. 903(a)). The court analogized the facts of this case to those of *Northeast Marine Terminal Co.* v. *Caputo, supra*, 432 U.S. at 253-271, where this Court found coverage for a worker engaged in stripping a container even though the work was only part of a modernized unloading process (Pet. App. A18). The 1972 amendments to the Act were intended "in part to adapt coverage to an increasing[ly] modernized and technological society," where ships' containers are unloaded away from the traditional docks and the ships themselves are constructed in modules (*id.* at A19):

> [P]roducts which were once produced from start to finish in one plant are now contracted out to "specialized" manufacturers and then shipped to a final assembly point. Present day realities and a changing economy have altered the picture of the traditionally centrally located American Shipyard operation into an "ongoing process of shipbuilding" scattered about on the navigable waterways of the continent.

The court concluded "that the geographic location, the plant history and the 'on-going operation' of American Bridge in fabricating component parts of vessels, meets the situs test" (*id.* at A20).

On petition for rehearing, the court modified its decision in part and found coverage for Cantu. Upon reconsideration, the court concluded that the black diamond navigational signal Cantu was constructing at time of injury had a direct relationship to navigation since it was required by the Coast Guard as a daytime indicator on barges towing 600 feet or more and was being constructed for installation on a barge[3] to be used in transporting ship modules to a shipyard in the East (Pet. App. A26).[4]

ARGUMENT

The decision of the court of appeals is correct, does not conflict with the decisions of any other circuit and is consistent with the rulings of this Court. Further review therefore is not warranted.

1. The court below correctly concluded that respondents Alford and Buller met the status requirement of Section 2(3) of the Act, which defines "maritime employment" as "including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker * * *." 33 U.S.C. 902(3).

The Act does not define "shipbuilder" or any of the other enumerated categories of maritime employees, but this Court has given guidance on how these terms should be construed in *P.C. Pfeiffer Co.* v. *Ford, supra*, and *Northeast Marine Terminal Co.* v. *Caputo, supra*. In *P.C. Pfeiffer*, the Court held that workers who were engaged in intermediate steps of moving cargo between ship and land

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[3]Upon a second petition for rehearing, the court deleted its incorrect statement that the barge was owned by American Bridge (Pet. App. A31).

[4]In addition, the court found that Cantu was covered by virtue of the fact that he could be assigned traditional maritime duties at any time (Pet. App. A26). See *P.C. Pfeiffer Co.* v. *Ford, supra*, 444 U.S. at 82.

transportation were engaged in maritime employment because "[a] worker responsible for some portion of that activity is as much an integral part of the process of loading or unloading a ship as a person who participates in the entire process" (444 U.S. at 82-83). Similarly, in *Northeast Marine Terminal* the Court concluded that a cargo "checker" was covered because his specialized task was "an integral part of the unloading process" (432 U.S. at 271). Following these principles, the court below correctly held that Alford and Buller were covered shipbuilders because their work on modules, built to contract specifications for particular vessels, was "an integral part of an ongoing shipbuilding process" (Pet. App. A13). The employees were involved in the indisputably maritime activity of constructing portions of specific vessels.[5] See *Dravo Corp.* v. *Maxin*, 545 F. 2d 374, 380 (3d Cir. 1976), cert. denied, 433 U.S. 908 (1977) (worker fabricating component sections of vessels before their assembly at different part of shipyard covered as a "shipbuilder").

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[5]The court's focus on whether a particular task constitutes an integral part of an indisputably maritime activity is in accord with well-established case law. See, *e.g.*, *Garvey Grain Co.* v. *Director, Office of Workers' Compensation Programs* 639 F. 2d 366, 370 (7th Cir. 1981); *Warren Brothers* v. *Nelson*, 635 F. 2d 552, 555 (6th Cir. 1980); *Newport News Shipbuilding & Dry Dock Co.* v. *Graham*, 573 F. 2d 167, 170 (4th Cir. 1978). This focus, furthermore, neutralizes the concerns of petitioner and the amicus curiae that the Fifth Circuit's opinion in this case extends coverage to "electronics workers in Nebraska making marine radios * * * and electricians in Tennessee wiring bilge pumps" (Amicus Br. 13). The decision below involved construction of custom built units that were fundamental and integral portions of specific ships. Construction of such units is readily distinguishable from the manufacture of marine radios, bilge pumps, and other equipment that are only "incidental to the construction of a ship" (Pet. App. C11). As noted by the ALJ in passing upon respondent Alford's claim, construction of custom-built ship modules "is in sharp contrast to the work of an employee who builts items of a standardized nature which can be readily used in homes, office buildings or machines as well as ships" (*ibid.*). Of course, even a worker who satisfies the status requirement must satisfy the situs requirement in order to be covered under the Act.

The court also correctly held that all three individual respondents were injured on a covered situs within the meaning of Section 3(a). That section extends coverage to persons engaged in maritime employment who are injured upon "the navigable waters of the United States (including any * * * adjoining area customarily used by an employer in loading, unloading, repairing or building a vessel)." 33 U.S.C. 903(a). The individual respondents were injured at petitioner's facility, which was purposefully located adjacent to navigable waters on a peninsula on the Sabine River. Each of the shops where the injuries occurred was located near the water (Pet. App. A5-A7, C13, C29, C40)[6] and in an area customarily used by petitioner to fabricate components of specific vessels, to maintain and repair equipment used in such work, and to load finished products onto barges for transportation to contracting shipbuilders' yards. These locations thus satisfied the situs requirement.

2. Petitioner challenges the "maritime employment" status ruling for Alford and Buller and the "navigable waters" situs ruling for all three respondents on the basis of one argument, for which it can cite no precedent.[7] Petitioner argues (Pet. 15) that respondents' injuries are not covered under the Act because there can be no shipbuilder status

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[6]There is ample precedent for the court's ruling that each injury occurred in sufficiently close proximity to the water's edge to engage coverage under the Act. See, *e.g.*, *Texports Stevedore Co.* v. *Winchester*, 632 F. 2d 504 (5th Cir. 1980) (en banc), cert. denied, No. 80-1549 (June 1, 1981); *Newport News Shipbuilding & Dry Dock Co.* v. *Graham*, *supra*, 573 F. 2d at 169; *Dravo Corp.* v. *Maxin*, *supra*, 545 F. 2d at 381.

[7]Petitioner cites (Pet. 14) only *Hite* v. *Maritime Overseas Corp.*, 375 F. Supp. 233, 235 (E.D. Tex. 1974), which is wholly inapposite and merely contains a general quotation from a commentator to the effect that the Act's 1972 amendments contemplate shipbuilding work "adjacent to the vessel being repaired or built."

and no finding that an area is customarily used for shipbuilding unless a completed vessel will be assembled at the site where the injuries occurred. The lower court correctly rejected this "restrictive approach" as unsupported "by the language of the LHWCA, case law or the underlying congressional purpose prompting the drafting of the LHWCA 1972 amendments" (Pet. App. A17).

The statute does not define "shipbuilding," and the Act nowhere limits the concept to work done "adjacent" to the vessel being built. Reading such a limitation into the Act, furthermore, would be contrary to this Court's directive that the extended coverage provisions of the amended 1972 Act be liberally construed to effectuate their remedial purposes. See *Northeast Marine Terminal Co.* v. *Caputo, supra*, 432 U.S. at 268. Moreover, the restrictive reading urged by petitioner would conflict with the rationale of this Court in *Northeast Marine Terminal.* The court below correctly noted (Pet. App. A18) the similarity between the segmentation of the shipbuilding process involved in this case and the discontinuity of the modernized loading and unloading process addressed in *Northeast Marine Terminal.* Claimant Blundo in that case was injured while "stripping" or unloading a cargo container that had been physically unloaded from a ship by another employer at another terminal. This Court, however, found that Blundo was covered because his work was "clearly an integral part of the unloading process as altered by the advent of containerization" (432 U.S. at 271). Thus, *Northeast Marine Terminal* held that a maritime operation is covered under the amended Act, despite the fact that portions of that operation are performed by different employers at different places.

The same reasoning supports the result below. Just as the cargo-handling industry has been modernized by "containerization," the shipbuilding industry has been modernized

by "module or assembly line techniques" so that "products which were once produced from start to finish in one plant are now contracted out to 'specialized' manufacturers and then shipped to a final assembly point" (Pet. App. A19). Finding coverage for modular construction of particular vessels is consistent with the language of the statute and gives effect to "[t]he congressional desire to accommodate the Act to modern technological changes." *Northeast Marine Terminal Co.* v. *Caputo, supra*, 432 U.S. at 271. Additionally, this result prevents employers from circumventing the Act's purposes when subcontracting shipbuilding work.[8]

3. Finally,[9] the court of appeals correctly concluded on petition for rehearing that respondent Cantu was a covered employee engaged in maritime employment. The court found (Pet. App. A26-A27) that Cantu was injured while

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[8]As noted by the ALJ in adjudicating Buller's claim, if he had been "performing the same work for Newport News Shipbuilding Company, the question would not even arise as to whether [he] was a shipbuilder. The fact that he was working for a different company does not change the nature of his work or the duties that he was performing" (Pet. App. C28).

[9]Petitioner also argues (Pet. 17-18) that "to the extent that it deviates from constitutional maritime jurisdiction [the Act] denies [petitioner and other entities] their constitutional right to trial by the jury." This argument (which was not made below) fails because the Act, as construed by the lower court, does not deviate from constitutional maritime jurisdiction. The courts have upheld the constitutionality of the 1972 amendments' expansion of federal coverage to land-based workers integrally involved in maritime activities. See *Alabama Dry Dock & Shipbuilding Corp.* v. *Kininess*, 554 F. 2d 176, 178-179 (5th Cir.), cert. denied, 434 U.S. 903 (1977); *Jacksonville Shipyards, Inc.* v. *Perdue*, 539 F. 2d 533, 544-546 (5th Cir. 1976), aff'd in part, 444 U.S. 69 (1979); *Dravo Corp.* v. *Maxin, supra*, 545 F. 2d at 377-379. Contrary to petitioner's assertions (Pet. 18), the interpretation of the Act by the lower court does not extend "to the furniture maker in Michigan, the clock maker in Connecticut, [or] the winchmaker in Oklahoma," but only to workers making custom-built, huge steel components for particular vessels at a covered situs. See note 5, *supra*.

constructing a navigational signal required by Coast Guard regulations for a barge that would carry petitioner's modules to a shipyard in New York. Because such work was necessary to enable the barge to make its trip in navigable waters, Cantu's employment at the moment of injury had a direct and substantial relationship to navigation and commerce, and was therefore clearly within the general category of "maritime employment."

Moreover, it is sufficient if a worker spends at least some of his time performing indisputably maritime duties. *Northeast Marine Terminal Co.* v. *Caputo, supra*, 432 U.S. at 273. "[T]he crucial factor is the nature of the activity to which a worker may be assigned." *P.C. Pfeiffer Co.* v. *Ford, supra*, 444 U.S. at 82. See also *Texports Stevedore Co.* v. *Winchester, supra*, 632 F. 2d at 516; *Howard* v. *Rebel Well Service*, 632 F. 2d 1348, 1350 (5th Cir. 1980). Cantu spent a substantial portion of his time maintaining and repairing machinery used in petitioner's module construction and other fabrication work. The maintenance of machinery used in shipbuilding operations is covered as an integral and essential part of those operations. See, *e.g.*, *Newport News Shipbuilding & Dry Dock Co.* v. *Graham, supra*, 573 F. 2d at 170; *Alabama Dry Dock & Shipbuilding* v. *Kininess, supra*, 554 F. 2d at 178.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Amicus Brief

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JOHN K. ALFORD, ANTHONY R. BULLER,
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UNITED STATES DEPARTMENT OF LABOR,

Respondents.

AMICUS BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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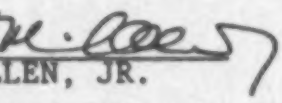
BY: 
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UNITED STATES DEPARTMENT OF LABOR,

Respondents.

APPEARANCE OF COUNSEL

The clerk is requested to enter my appearance as Counsel for Kaiser Aluminum & Chemical Sales, Inc. who in this Court is Amicus Curiae. I certify that I am a member of the Bar of the Supreme Court of the United States.

JOSEPH M. ALLEN, JR.

Counsel for Kaiser Aluminum &
Chemical Sales, Inc.

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UNITED STATES DEPARTMENT OF LABOR,

Respondents.

MOTION TO ALLOW BRIEF AS AMICUS CURIAE
AND STATEMENT OF INTEREST OF
PROPOSED AMICUS CURIAE

Pursuant to Rule 36, United States Supreme Court Rules, Kaiser Aluminum & Chemical Sales, Inc. ("Kaiser") moves this Honorable Court to allow it leave to file a Brief as Amicus Curiae in support of the Petition for Writ of Certiorari herein and in support of this Motion, shows the following:

1. That Kaiser's interest in the

disposition of the captioned case is based on the adverse impact which it has had in recent Department of Labor proceedings involving Kaiser, viz: Clark v. Kaiser Aluminum & Chemical Sales, Inc., Case No. 80-LHCA-1071-N, OWCP No. 6-47917 (June 9, 1981); Campbell v. Kaiser Aluminum & Chemical Sales, Inc., Case No. 80-LHCA-1070-N, OWCP No. 6-47917 (June 9, 1981); and Sylvester v. Kaiser Aluminum & Chemical Sales, Inc., Case No. 80-LHCA-799-N, OWCP No. 6-45393 (July 7, 1981).

2. That leave to file an Amicus Brief is necessary because Kaiser was unable to obtain consent to file it from Martin W. Dies, Attorney for Respondent, Anthony R. Buller.

HAMILTON, BUTLER, RIDDICK,
TARLTON & ALLEN

BY:
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Counsel for Kaiser Aluminum
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TABLE OF CONTENTS

	Page
Appearance	ii
Motion to Allow Brief as Amicus Curiae	iii
Statement of Interest as Amicus Curiae	iii
Table of Contents	1
Table of Authorities	2
Constitutional and Statutory Provisions Involved and at Issue	3
Questions Presented for Review	4
Parties	4
Jurisdiction	4
Statement of the Case	4
Statement of Facts	4
Opinions Below	4
Reasons for Granting the Writ	5-13
Conclusion	18
Prayer for Relief	19

TABLE OF AUTHORITIES

Page

Alabama Dry Dock & Shipbuilding Co. v. Kinniness, 554 F.2d 176 (5 Cir. 1977) ...10,11

Alford v. American Bridge Division, United States Steel Corporation, 642 F.2d 807 (5 Cir. 1981), modified 655 F.2d 86 (5 Cir. 1981).....5-7,9,12,14-18

Campbell v. Kaiser Aluminum & Chemical Sales, Inc., Case No. 80-LHCA-1070-N, OWCP No. 6-47914 (June 12, 1981) 14,15,16,17

Clark v. Kaiser Aluminum & Chemical Sales, Inc., Case No. 80-LHCA-1071-N, OWCP No. 6-47917 (June 9, 1981).....7,14-17

Dennis v. Boland Marine and Manufacturing, Inc., 13 BRBS 528 (1981) 14

Dubay v. FMC Marine Fabricators, Inc. v. Nulty, 539 F.2d 533 (5 Cir. 1976), cert. denied 97 S. Ct. 2973 (1977) 12

Halter Fabricators, Inc. v. Nulty, 539 F.2d 533 (5 Cir. 1976), cert. denied 97 S. Ct. 2973 (1973) 12

Ingalls Shipbuilding Corp. v. Morgan, 551 F.2d 61 (5 Cir. 1977), cert. denied 342 U.S. 766 (1977) 12

Jackson Shipyards, Inc. v. Perdue, 539 F.2d 533 (5 Cir. 1976) 10,11

Jenkins v. Kaiser Aluminum & Chemical Sales, Inc., Case No. 80-LHCA-1506-N, OWCP No. 6-49843 (February 3, 1981) 16,17

Larsen, Workmens' Compensation, § 89.47 12

Mohamed v. Seatrain Shipbuilding Corp., 2 BRBS (ALJ) 85 (1975) 12

Sylvester v. Kaiser Aluminum & Chemical Sales, Inc., Case No. 80-LHCA-799-N, OWCP No. 6-45393 (July 7, 1981) 14,15,17

Thompson v. Oceanic Container Service, Inc., 8 BRBS (ALJ) 81 (1978) ..8,9,16

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED AND AT ISSUE

Page

33 U.S.C. § 902(3) 6,9

33 U.S.C. § 903(a) 5,9

QUESTIONS PRESENTED FOR REVIEW, PARTIES, JURISDICTION, STATEMENT OF THE CASE STATEMENT OF FACTS, OPINIONS BELOW

Kaiser Aluminum & Chemical Sales, Inc., (hereinafter referred to as "Kaiser") submits a Motion, pursuant to Rule 36, United States Supreme Court Rules, and a Proposed Brief as Amicus Curiae, in support of the Petition for Writ of Certiorari filed by American Bridge Division, United States Steel Corporation in this case. For purposes of brevity, Kaiser adopts and incorporates by reference the Questions Presented for Review, Identification of Parties, Jurisdictional Statement, Statement of the Case, Statement of Facts, and Opinions Below heretofore filed by the Petitioner.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE COURT OF APPEALS FOR THE FIFTH CIRCUIT HAS ERRONEOUSLY DECIDED AN IMPORTANT FEDERAL QUESTION BY HOLDING THAT THE LONGSHOREMENS' AND HARBOR WORKERS' COMPENSATION ACT MAY APPLY TO MANUFACTURERS OF COMPONENT PARTS OF VESSELS.

The decision in Alford v. American Bridge Division, United States Steel Corporation, 642 F.2d 807 (5 Cir. 1981), modified 655 F.2d 86 (5 Cir. 1981), has misconstrued the Longshoremens' and Harbors' Workers Compensation Act by extending it far beyond its intended scope and purpose in holding that an employee of a manufacturer of components for vessels may be covered under the "status" definition from Section 903(a) of the Act. In making this departure from

precedent, the Court found that employees of a metals fabricator, engaged in work on various component parts of steel barges, could be considered maritime employees covered by the Act.

> [W]e affirm the ALJ's findings that Alford and Buller were "employees" - shipbuilders - within the meaning of 33 U.S.C. §902(3) while fabricating custom-built modules destined to be installed in newly constructed vessels.

Alford, supra at 813.

As outlined in Petitioner's brief, this extension of the Act to component part manufacturers does violence to the clear meaning of the Act as determined by its express language as well as its legislative history. The spread of the Alford rationale, which has already begun, has led to absurd extensions of the Act so that, for example, a Kaiser facility devoted exclusively to the manufacture of aluminum tanks has been

determined to be a maritime employer subject to the Act. Clark v. Kaiser Aluminum & Chemical Sales, Inc., Case No. 80-LHCA-1071-N, OWCP No. 6-47917 (June 9, 1981). In the Clark decision the subject Kaiser facility was determined to be covered by the Act because the Aluminum tanks manufactured there were destined for eventual installation into ocean going vessels constructed by a shipyard some 150 miles away.

> Here, Employer maintains that it was merely involved in the manufacture of component parts and that it was not involved in an integral part of the ship building function. This line of reasoning was recently rejected by the Fifth Circuit in Alford v. American Bridge Division, U. S. Steel Corporation....

Clark, supra at Page 4.

Clearly, the Alford decision and this further extension of the Alford rationale in Clark, is as an extreme and erroneous application of the Act as the hypothetical

example provided by the Department of Labor, earlier, in Thompson v. Oceanic Container Service, Inc., 8 BRBS (ALJ) 81,90 (1978). It is significant that in Thompson, supra the Department of Labor noted that an employee of an inland factory fabricating metal cargo containers would not have a maritime situs or status merely because he built containers which are component parts of a ship.

> Finally, a word should be said with respect to the contention of Claimants' able counsel to the effect that repairs to containers should be treated as ship repairs in the light of the reference in Northeast Marine Terminal, supra, to the container as "a modern substitute for the hold of the vessel" (432 U.S. at 271). The analogy, however, should not be stretched beyond its context. As appears from the language immediately preceding and following the quoted phrase, all that was intended to be conveyed was the notion that stuffing or stripping a container is the functional equivalent of loading or unloading cargo aboard a vessel. Surely, the Supreme Court was not suggesting that a container manufacturing plant

> is per se a shipyard, or that a sheet metal worker engaged in fabricating containers in Zanesville, Ohio is a shipbuilder within the meaning of Section 2(3), and is therefore covered under Section 3(a) of the Act if the fabricating plant in which he is injured is in an area adjoining the Muskingum River.

Thompson v. Oceanic Container Service, Inc., supra at 90. Clearly, this example concerning component part manufacturers was selected because of its obviousness, i.e. that it was unimaginable that coverage under the Act could be carried to such an extreme.

Prior to Alford, the law was quite clear that manufacturing of component parts for vessels did not bring the manufacturer or its employees within the ambit of the status requirement of 33 U.S.C. §902(3). This clear interpretation, it is emphasized, was expressed unequivocably in a series of cases decided subsequent to the 1972 amendments to

the Act. Jackson Shipyards, Inc. v. Perdue, 539 F.2d 533 (5 Cir. 1976), Alabama Dry Dock & Shipbuilding Co. v. Kinniness, 554 F.2d 176 (5 Cir. 1977).

Of particular significance is the portion of the Perdue decision dealing with claimant Charles W. Skipper. Although he was an employee of Jacksonville Shipyards, an actual shipyard in the business of building vessels, on the day of his injury Mr. Skipper was engaged in salvaging steel which was destined for plant construction usage. Despite the fact that he was employed by a bona fide shipyard, and despite the fact that the materials he was salvaging were to be used in a shipyard, he was nonetheless held not to have a maritime status. The reason, according to the Fifth Circuit, was that he was not furthering "shipbuilding goals" of his employer.

> The purpose of the worker's duties was to provide materials for a plant which would manufacture equipment, not ships....Consequently, he, unlike Kinniness, was not directly furthering the shipbuilding goals of his employer.

Kinniness, supra at 178, discussing the Skipper portion of Perdue (emphasis supplied). As noted, this manufacture of "equipment, not ships" did not constitute maritime employment.

Although there are other cases, involving manufacturers of component parts, which may, on first inspection, appear to have held that the subject employees were covered by the Act, these cases do not in fact alter the asserted general rule that manufacturers of component parts are not to be considered maritime employers or shipbuilders. The reason is that these purported component part cases all involve work done in an actual shipyard. Thus, these cases are clearly distinguishable from the actual situation

presented in the Alford cases in which component part manufacturers in manufacturing plants, not shipyards, were held to be covered. See, e.g., Ingalls Shipbuilding Corp. v. Morgan, 551 F.2d 61 (5 Cir. 1977), cert. denied, 342 U.S. 766 (1977); Halter Marine Fabricators, Inc. v. Nulty, 539 F.2d 533 (5 Cir. 1976), cert. denied, 97 S.Ct. 2973 (1977); Mohamed v. Seatrain Shipbuilding Corp., 2 BRBS (ALJ) 85 (1975); Dubay v. FMC Marine & Rail Equipment Co., 3 BRBS (ALJ) 43 (1976); Larsen, Workmens' Compensation, §89.47.

Thus, the Alford decision, has clearly created a substantial change in the law and has gone against the weight of previous authority. It is necessary, therefore, that this decision be fully reviewed so that the coverage of the Act can be explicitly defined to exclude manufacturers

of component parts. Otherwise, if the Act is not restricted in this way, electronics workers in Nebraska making marine radios, for example, and electricians in Tennessee wiring bilge pumps would all eventually be covered by the Act because they would be engaged in the manufacture of items of a uniquely maritime nature and destined for installation in vessels. However, they should not be so covered because they are not working for an employer with "shipbuilding goals". Their employers like United States Steel Corporation and Kaiser Aluminum, manufacture equipment or component parts and not ships.

II.

THE DECISION OF THE COURT OF APPEALS FOR THE FIFTH CIRCUIT HAS WIDESPREAD CONSEQUENCES AFFECTING EMPLOYERS, EMPLOYEES AND INSURORS THROUGHOUT THE UNITED STATES.

The Alford decision, as noted, has already begun to be applied and further extended by the Federal Courts and the Administrative Law Judges within the Department of Labor. See, e.g. Dennis v. Boland Marine and Manufacturing, Inc., 13 BRBS 528 (1981); Clark, supra; Campbell v. Kaiser Aluminum & Chemical Sales, Inc., Case No. 80-LHCA-1070-N, OWCP No. 6-47914 (June 12, 1981); and Sylvester v. Kaiser Aluminum & Chemical Sales, Inc., Case No. 80-LHCA-799-N, OWCP No. 6-45393 (July 7, 1981).

In the above Kaiser decisions, each of which is presently pending before the Benefits Review Board on appeal, Kaiser Aluminum has been adversely affected by the Alford decision. Also, in each of these decisions the same aluminum tank manufacturing facility owned by Kaiser Aluminum, the Pinto

Island tank manufacturing facility in Mobile, Alabama, is involved.

Although these aluminum tanks were admittedly destined to be component parts of vessels, Kaiser in no manner whatsoever had any connection with building the actual ships into which these components would later be installed. However, applying Alford the Department of Labor concluded that, even though Kaiser was not actually a shipbuilder, even though Kaiser was not obligated contractually to build ships, and even though Kaiser had no shipbuilding goals, under Alford, Kaiser would be deemed to have shipbuilding goals because these tanks would be placed into vessels by a shipbuilder at a shipyard elsewhere in New Orleans, Louisiana. Clark, Campbell, Sylvester, supra.

This extension of the concept of shipbuilding under the Act is further

questioned in view of the fact that, as the record in the foregoing Kaiser cases clearly demonstrates, the subject aluminum tanks were destined to be removable from the vessels in which they were placed. Also, the aluminum tanks were never intended to become permanent parts of the vessels. Thus, the application of the Alford decision has already reached the unimaginable extreme hypothesized in Thompson, supra.

Additionally, it is possible to demonstrate even more confusion which the Alford decision has created in the law of workers' compensation, again, using Kaiser Aluminum as the affected party. An earlier version of Alford, the initial Benefits Review Board decision, Alford v. American Bridge Division, United States Steel Corp., 7 BRBS 484 (1978), which, we emphasize is the better interpretation of law which should be

reinstated herein, was applied in Jenkins v. Kaiser Aluminum & Chemical Sales, Inc., Case No. 80-LHCA-1506-N, OWCP No. 6-49843 (February 3, 1981), which resulted in a decision in favor of Kaiser. In Jenkins, the same aluminum tank fabrication facility as in Clark, Campbell, and Sylvester was fully evaluated and determined to be outside of the Act. The Administrative Law Judge concluded that "Kaiser was not engaged in an ongoing shipbuilding nor repair facility and, consequently, [the] Claimant was not engaged in a maritime activity...." Jenkins, supra at Page 5. Thus, Jenkins, as well as Clark, Campbell and Sylvester, supra; clearly demonstrates the potential for widespread application of Alford, should it not be properly limited or redefined by this Court.

It is equally clear that other metals fabricators and other component part

manufacturers, and their insurors, are equally subject to the potential extension of the Longshoremens' and Harbor Workers' Compensation Act which Alford presages. For that reason, we respectfully submit that the Alford decision and the interpretation of the federal statute therein, which is due to be reversed, is uniquely ripe for further review by this Court.

CONCLUSION

The Court below has clearly gone against the plain meaning and intent of the Longshoremens' and Harbor Workers' Compensation Act, and has also reversed the long standing rules respecting coverage of component part manufacturers. For that reason alone, and because of the widespread impact of such a decision, Kaiser asserts that the Court should take this opportunity to define and

clarify this very important issue concerning the extent of coverage of the Longshoremens' and Harbor Workers' Compensation Act.

PRAYER FOR RELIEF

For all the reasons set forth hereinabove, it is respectfully submitted that the Petition for Writ of Certiorari herein should be granted.

Respectfully submitted,

HAMILTON, BUTLER, RIDDICK,
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CERTIFICATE OF SERVICE

I, Joseph M. Allen, Jr., the attorney for Kaiser Aluminum & Chemical Sales, Inc., Amicus Curiae herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 3rd day of December, 1981, I served the foregoing, by mailing the same by United States mail, properly addressed, with first class postage prepaid to the Clerk of the Supreme Court of the United States and to the following Counsel of Record: Louis Bien, Esq., Attorney at Law, 1023 Moody, Galveston, TX 77550, Mary A. Sheehan, Esq., U. S. Department of Labor, 200 Constitution Avenue, N.W., Suite N-2716, Washington, D. C. 20210, Martin Dies, III, Esq., Stephenson, Thompson & Dies, 712 Division Street, Orange, TX 77630, Michael E. Shelton, Esq., Schechter & Shelton, Inc., 2080 Two Shell Plaza, Houston, TX 77002, Stanley K. George, Esq., 3800 Park Lane, Port Arthur, TX 77640, Laurie M. Streeter, Esq., Associate Solicitor, U. S. Department of Labor, 200 Constitution Avenue, N.W., Suite N-2716, Washington, D. C. 20210, Rex E. Lee, Esq., Solicitor General, Department of Justice, Washington, D. C. 20530, and Gilbert Renaut, Esq., U. S. Department of Labor, 200 Constitution Avenue, N.W., Suite N-2716, Washington, D. C. 20210.

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